

BOSTON PUBLIC LIBRARY



3 9999 06316 725 6

No. 9353.83a26



GIVEN BY

U. S. SUPT. OF DOCUMENTS



no mark

AMEND FEDERAL TRADE COMMISSION ACT

HEARINGS

BEFORE A

SUBCOMMITTEE OF THE COMMITTEE ON
INTERSTATE AND FOREIGN COMMERCE
HOUSE OF REPRESENTATIVES

SEVENTY-NINTH CONGRESS

SECOND SESSION

ON

H. R. 2390

A BILL TO AMEND THE ACT CREATING THE FEDERAL
TRADE COMMISSION, TO DEFINE ITS POWERS
AND DUTIES, AND FOR OTHER PURPOSES

JANUARY 29, 30, FEBRUARY 27, 28,
MARCH 4, 5, 7, 8, 11, 1946

Printed for the use of the
Committee on Interstate and Foreign Commerce



1757

5. Congress: House. Committee on Interstate and Foreign Commerce

AMEND FEDERAL TRADE COMMISSION ACT

HEARINGS

BEFORE A

SUBCOMMITTEE OF THE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE HOUSE OF REPRESENTATIVES

SEVENTY-NINTH CONGRESS

SECOND SESSION

ON

H. R. 2390

A BILL TO AMEND THE ACT CREATING THE FEDERAL
TRADE COMMISSION, TO DEFINE ITS POWERS
AND DUTIES, AND FOR OTHER PURPOSES

JANUARY 29, 30, FEBRUARY 27, 28,
MARCH 4, 5, 7, 8, 11, 1946

Printed for the use of the
Committee on Interstate and Foreign Commerce



UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1946

CONFIDENTIAL
3303.85416
U. S. SUPERINTENDENT OF DOCUMENTS

JUN 20 1946

COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE

CLARENCE F. LEA, California, *Chairman*

ROBERT CROSSER, Ohio	CHARLES A. WOLVERTON, New Jersey
ALFRED L. BULWINKLE, North Carolina	PEIR G. HOLMES, Massachusetts
VIRGIL CHAPMAN, Kentucky	B. CARROLL REECE, Tennessee
LYLE H. BOREN, Oklahoma	CHARLES A. HALLECK, Indiana
LINDLEY BECKWORTH, Texas	CARL HINSHAW, California
J. PERCY PRIEST, Tennessee	CLARENCE J. BROWN, Ohio
OREN HARRIS, Arkansas	EVAN HOWELL, Illinois
GEORGE G. SADOWSKI, Michigan	LEONARD W. HALL, New York
RICHARD F. HARLESS, Arizona	THOMAS D. WINTER, Kansas
JOHN W. MURPHY, Pennsylvania	JOSEPH P. O'HARA, Minnesota
EDWARD A. KELLY, Illinois	WILSON D. GILLETTE, Pennsylvania
LUTHER PATRICK, Alabama	
JOHN B. SULLIVAN, Missouri	
DWIGHT L. ROGERS, Florida	
BENJAMIN J. RABIN, New York	
VITO MARCANTONIO, New York	

ELTON J. LAYTON, *Clerk*

F. P. RANDOLPH, *Assistant Clerk*

FEDERAL TRADE SUBCOMMITTEE

GEORGE G. SADOWSKI, Michigan, *Chairman*

DWIGHT L. ROGERS, Florida	B. CARROLL REECE, Tennessee
BENJAMIN J. RABIN, New York	EVAN HOWELL, Illinois
VITO MARCANTONIO, New York	JOSEPH P. O'HARA, Minnesota

CONTENTS

	Page
Statements by—	
Stason, Dr. E. Blythe, dean, law school, University of Michigan.....	10
Digges, Mr. Isaac W., counsel, National Association of Advertisers..	24
Murphy, Mr. Charles E., general counsel, Advertising Federation of America.....	56
Hoge, Mr. James F., attorney, Proprietary Association of America....	59
Mock, Mr. Hugo, attorney, Toilet Goods Association.....	79
Liddy, Mr. Sylvester J., attorney, United States Trade Mark Association.....	84
Perry, Mr. Kenneth, vice president and general manager, Johnson & Johnson, New Brunswick, N. J.....	91
Swain, Dr. Robert L., editor, Drug Trade News, New York City....	96
Frates, Mr. George H., Washington representative of National Association of Retail Druggists.....	109
Canfield, Mr. Robert E., attorney at law, New York City, N. Y.....	111
Kelley, Hon. William T., chief counsel, Federal Trade Commission.....	117-130
Davis, Hon. Ewin L., member, Federal Trade Commission....	129-393-416
Wooden, Mr. Walter B., assistant chief counsel, Federal Trade Commission.....	157
Montague, Mr. Gilbert H., attorney at law, New York City.....	186-189
Whiteley, Mr. Richard P., assistant chief counsel, Federal Trade Commission.....	187-245
Cassedy, Mr. James W., special attorney on the staff of the chief counsel, Federal Trade Commission.....	267-354
Rohr, Mrs. Elizabeth, Washington representative of Consumers' Union of United States Consumers' Union.....	345
Thompson, Mrs. Margaret D., editor, consumer education service of the American Home Economics Association.....	349
Wubnig, Mrs. Sylvia, representing the National League of Women Shoppers, Washington, D. C., and New York City.....	350
Richter, Mr. Irving, national legislative representative of the United Automobile Workers, CIO.....	353
Keyserling, Mrs. Mary Dublin, representing the American Association of University Women, Washington, D. C.....	385
Marsh, Mr. Benjamin C., representing the Peoples' Lobby.....	391
Freer, Hon. Robert E., member, Federal Trade Commission.....	544
Williams, Mr. Nathan Boone, representing the Association of American Soap and Glycerine Manufacturers-Producers, Inc.....	563
Communications, briefs, statements:	
Motor and Equipment Manufacturers' Association, brief for.....	34
Chadburne, Wallace, Parke & Whiteside, brief for.....	39
Drug, chemical, and allied trades section of the board of trade, New York, brief on behalf of.....	47
Chamber of Commerce of the State of New York, resolution by.....	48
Cream of Wheat Corp., brief for.....	49
Associated Drug and Chemical Industries of Missouri, brief for.....	51
Dunn, Mr. Charles Wesley, letter dated February 18, 1946, from.....	53
Fraser, Mr. Samuel, secretary of International Apple Association, letter dated February 15, 1946, from.....	53
Hanson, Mr. C. C., secretary of the Association of the Southern Commissioners of Agriculture, letter dated February 15, 1946, from....	54
Murphy, Mr. James B., letter dated February 8, 1946, from, to C. C. Hanson.....	55
National Drug Trade Conference, Mr. Ray Schlotterer, secretary, letter dated February 5, 1946, from.....	55

Communications, briefs, statements—Continued	Page
Toilet Goods Association, Mr. S. L. Mayham, executive vice president, letter dated May 18, 1945, from	55
Alberty Food Products, of Hollywood, Calif., letter dated January 8, 1946, from	56
United States Trade Mark Association, memorandum on behalf of, submitted by Mr. Sylvester J. Liddy	88
Parke, Austin & Lipcomb, Inc., memorandum on behalf of	102
Swain, Mr. Robert L., an address delivered by, before the Associated Drug and Chemical Industries of Missouri, May 9, 1945	104
Curley, Hon. James M., letter from	116
Ellison, Mr. Newell W., and Mr. Ernest W. Jennes, attorneys at law, brief of, in support of H. R. 2390	181
Montague, Mr. Gilbert H., series of statements submitted by, relating to the predponderance-of-evidence rule	214
Journal of the American Bar Association, excerpts from December 1945 issue as follows:	
(a) Senate Judiciary Committee reports administrative procedure bill	226
(b) Attorney General's statement approving the proposed Administrative Procedure Act	235
(c) Chart of principal sections of the administrative procedure bill as reported	231
(d) Comparison of bills as to administrative law and procedure	237
(e) Editorial on the administrative procedure bill	242
(f) Chart history of administrative law bills	236
Whiteley, Mr. Richard P., statements submitted by, regarding three cases	255
Dunbar, Hon. P. B., Commissioner of Food and Drugs, letter dated July 13, 1945, from, addressed to Hon. B. Carroll Reece	238
Parelhoff, Mrs. Bernard, acting president, New York Chapter of the League of Women Shoppers, Inc., letter dated March 19, 1946	353
Cullen, Mr. F. J., letter dated March 8, 1932, from, addressed to the Federal Trade Commission, attention E. J. Adams	358
New York Board of Trade, Inc., letter dated January 31, 1946, from, enclosing resolution on behalf of	392
Printers' Ink, magazine, editorial entitled "We Recant"	542
Ferris, Mr. Frederick D., letter dated February 17, 1940, from	559
Taylor, Mr. Edward, letter dated February 19, 1940, from	559
Advertising and Selling, magazine, editorial entitled "Why Hysterics Over the FTC"	559
Institute of Consumer Facts, article by, entitled "You've a Real Friend in the Federal Trade Commission"	560
New York Post, article in September 14, 1939, issue of, entitled "Reaction Held Worse Peril to Business Than Radicals"	561
Bedding Manufacturer, magazine, issue of March 1941, entitled "Federal Trade Commission Has Impressive Record"	561
Hoge, Mr. James F., extension of remarks in rebuttal on behalf of the Proprietary Association of America	565-579
Cassedy, Mr. James W., letter dated March 15, 1946	580
Federal Trade documents submitted:	
Table showing findings and orders in all cases involving food, drugs, therapeutic devices, and cosmetics issued subsequent to the enactment of the Wheeler-Lea Act	146
Table showing analysis of cases in which findings and orders were issued subsequent to enactment of Wheeler-Lea Act involving food, drugs, therapeutic devices, and cosmetics, showing manner of disposition and courts' disposition of those appealed	156
Statistical table giving penalties and costs for violation of cease and desist orders issued by the Federal Trade Commission in 41 cases	246
Text of complaints submitted—	
In matter of Miles Laboratory, Inc.	300
In the matter of Capudine Chemical Co., Inc.	304-306
In the matter of Emerson Drug Co., Inc.	309-312
In the matter of the Larned Corp. et al.	314

Federal Trade documents submitted—Continued	Page
Copies of Bromo-Seltzer labels.....	328-329
Chart entitled "Radio and periodical division".....facing	402
Text of stipulations submitted—	
In the matter of Miles Laboratory, Inc.....	407
In the matter of Capudine Chemical Co., Inc.....	410
In the matter of Emerson Drug Co., Inc.....	411
In the matter of Stanback Co., Ltd.....	413
In the matter of Richard Hudnut, Inc.....	425
In the matter of Western Medical Corp., Inc.....	430
In the matter of Dearborn Supply Co., Inc.....	582
Findings of facts and conclusions, Rigid Steel Conduit Association...	440
Court documents submitted:	
Opinion of the court, filed November 30, 1944, in the Third Circuit Court of Appeals, in re <i>Jacob Siegel Co., petitioner, v. Federal Trade Commission, respondent</i>	73
Appeal affirmed February 7, 1944, in re <i>Miles Laboratory, Inc., appellants, v. Federal Trade Commission, etc., et al., appellees</i> , District of Columbia Court of Appeals.....	320
Decree dismissing act, June 23, 1943, <i>Miles, Laboratory Inc., plaintiff, v. Federal Trade Commission, etc., et al.</i> , District Court, District of Columbia.....	322
Decision, July 23, 1940, on petition to review, <i>George H. Lee Co., petitioner, v. Federal Trade Commission, respondent</i> , Eighth Circuit Court of Appeals.....	372
Decision, March 7, 1944, seventh circuit court of appeals, <i>The United States of America, libellant-appellant, v. Willard Tablet Co., Claimant-appellee</i> , on appeal from the district court.....	375
Decision, February 16, 1942, and December 6, 1943, second circuit court of appeals, re <i>Fresh Grown Preserve Corp., Inc.</i>	529
Congressional reports, statements submitted:	
Senate Report No. 1705, Seventy-fourth Congress, to accompany S. 3744.....	479
Senate Report No. 221, Seventy-fifth Congress, to accompany S. 1077.....	486
House Report No. 1613, Seventy-fifth Congress, to accompany S. 1077.....	492
House Report No. 1774, Seventy-fifth Congress, conference report on S. 1077.....	515
Statement by Hon. B. Carroll Reece in Congressional Record, January 12, 1938.....	523
Statement by Hon. Harry S. Truman in Congressional Record, June 2, 1938.....	557
Text of bill, H. R. 2390.....	1
Report by Federal Security Agency.....	2
Report by Federal Trade Commission.....	4

AMEND FEDERAL TRADE COMMISSION ACT

TUESDAY, JANUARY 29, 1946

HOUSE OF REPRESENTATIVES,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D. C.

The committee met at 10 a. m., the Honorable Clarence F. Lea (chairman) presiding.

The CHAIRMAN. The committee will begin hearings this morning on H. R. 2390, a bill to amend the act creating the Federal Trade Commission, to define its powers and duties, and for other purposes. The bill and reports from Government agencies will be inserted at this place of the record.

(The matter referred to is as follows:)

[H. R. 2390, 79th Cong., 1st sess.]

A BILL To amend the Act creating the Federal Trade Commission, to define its powers and duties, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 5 (c) of the Act entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914, as amended (U. S. C., title 15, sec. 45 (c)) is hereby amended to read as follows:

"(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the circuit court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be modified or set aside. A copy of such petition shall be forthwith served upon the Commission, and thereupon the Commission forthwith shall certify and file in the court a transcript of the entire record in the proceeding, including all the evidence taken and the report and order of the Commission. Upon such filing of the petition and transcript the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, evidence, and proceedings set forth in such transcript a decree affirming, setting aside, or modifying as in its judgment the circumstances of the case require, the order of the Commission, and enforcing the same to the extent that such order is affirmed, and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by the preponderance of the evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before

the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by the preponderance of the evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 240 of the Judicial Code."

SEC. 2. Section 5 (1) of such Act, as amended (U. S. C., title 15, sec. 45 (1)), is hereby amended to read as follows:

"(1) Any person, partnership, or corporation who violates an order of the Commission to cease and desist after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than \$1,000 for each violation, not to exceed the sum of \$10,000 in the aggregate, which shall accrue to the United States and may be recovered in a civil action brought by the United States."

SEC. 3. Section 15 (a) of such Act, as amended (U. S. C., title 15, sec. 55 (a)), is hereby amended to read as follows:

"Sec. 15. For the purposes of sections 12, 13, and 14—

"(a) The term 'false advertisement' means an advertisement, other than labeling, which is misleading in a material respect; and in determining whether any advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations so as to prevent deception resulting from indirection and ambiguity, as well as from statements which are false. No advertisement of a drug shall be deemed to be false if it is disseminated only to members of the medical profession, contains no false representation of a material fact, and includes, or is accompanied in each instance by truthful disclosure of, the formula showing quantitatively each ingredient of such drug."

SEC. 4. Section 15 of such Act, as amended (U. S. C., title 15, sec. 55), is hereby further amended by adding a new subparagraph as follows:

"(f) The term 'labeling' means all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article."

SEC. 5. Such Act is further amended by adding at the end thereof a new section to read as follows:

"SEC. 19. Food, drugs, devices, and cosmetics shall be exempt from the provisions of this Act to the extent of the application or the extension thereto of the Federal Food, Drug, and Cosmetic Act, approved June 25, 1938, as amended (U. S. C., title 21, chapter 9)."

FEDERAL SECURITY AGENCY,
Washington 25, May 3, 1945.

HON. CLARENCE F. LEA,

*Chairman, Committee on Interstate and Foreign Commerce,
House of Representatives, Washington 25, D. C.*

DEAR MR. CHAIRMAN: This letter is in response to your request of March 2, 1945, for a statement of the views of this Agency upon H. R. 2390, a bill to amend the act creating the Federal Trade Commission, to define its powers and duties, and for other purposes.

While the bill would not amend the Federal Food, Drug, and Cosmetic Act, or directly affect administrative responsibilities of this Agency, certain of its provisions are of concern to us because of the dovetailing of our functions and those of the Federal Trade Commission in the control of representations concerning food, drugs, and cosmetics.

The first section of the bill would amend section 5 of the Federal Trade Commission Act so as to make the findings of fact of the Commission, upon which its orders are based, conclusive only if supported by the preponderance of the evidence rather than simply by the evidence.

We are concerned that this proposed change may establish a precedent for changing the Federal Food, Drug, and Cosmetic Act so that the quasi-legislative

and quasi-judicial powers of the Federal Security Administrator in the enforcement of that act would both be significantly impaired.

I have noted Mr. Reece's statement in the Appendix to the Congressional Record (March 6, 1945, p. A1117) in connection with the introduction of this bill, in which he disclaims any intention of disturbing the conclusiveness of administrative findings in quasi-legislative orders. It seems to me, however, that this may nevertheless be used as a precedent for legislation applicable to rule making. The Congress used the provisions for court review of quasi-judicial orders of the Federal Trade Commission as both precedent and pattern for the then novel provisions of the Food, Drug, and Cosmetic Act for review of quasi-legislative orders. Certainly the change would be a clear precedent for legislation affecting the present method of review of applications for interstate commerce in new drugs.

It has been our consistent policy to limit the findings of facts in orders we have promulgated to those facts which we think are supported by a preponderance of the evidence. We would be disturbed at any proposal looking toward a transfer to the judiciary of the duty of weighing the evidence and determining its preponderance in records as technical as those ordinarily made in hearings under the Food, Drug, and Cosmetic Act.

We have no comment to offer on section 2 of the bill which would amend section 5 of the Federal Trade Commission Act by changing the penalties prescribed for its violation.

Section 3 of the bill would amend the definition of false advertisement in section 15 (a) of the Federal Trade Commission Act. The amendment would change a provision of the act which is identical in its import with a provision of section 201 (n) of the Food, Drug, and Cosmetic Act. It would repeal the mandate of the present law to the administrative agency and to the courts to take into account, in determining whether representations for an article are misleading, failure to reveal facts material with respect to the consequences which may result from the use of the article under the conditions prescribed in those representations, or under such conditions as are customary or usual. In deleting this mandate, we think the conclusion is inescapable that the standard of truthfulness set up by the statute is lowered. While the amended language could perhaps be construed as broadly as the original provision, it is by no means apparent how the courts could do so in the light of the legislative history created by Mr. Reece's declared purpose in making the change.

We are gravely concerned that the adoption of this amendment will furnish a persuasive basis for a similar amendment to section 201 (n) of the Food, Drug, and Cosmetic Act. This would unquestionably impair the effectiveness of the act in controlling misrepresentations that result in harm to health.

Section 4 of the bill would include the Food, Drug, and Cosmetic Act definition of labeling in section 15 of the Federal Trade Commission Act which lists definitions "for the purposes of sections 12, 13, and 14." Because of its limitation to these sections, we do not see that it would have any practical effect on the relationship between activities in the enforcement of the two laws since, so far as we are aware, the Federal Trade Commission's proceedings against labeling have not been under sections 12, 13, and 14 but under section 5. (See *Fresh Grown Preserve Corp. v. Federal Trade Commission*, 125 Fed. (2d) 917, 919.)

The final section of the bill is apparently designed to deny control under the Federal Trade Commission Act of anything that could be controlled under the Food, Drug, and Cosmetic Act. The text of the language is derived from section 902 (b) of the latter law, which exempts from it articles subject to the Meat Inspection Act. This wording, in the context in which it appears in the Food, Drug, and Cosmetic Act, is not entirely clear in all of its aspects. It seems even less clear when transposed to the context of the Federal Trade Commission Act. We have no adverse comment to offer on the purpose of the provision but we doubt that it will accomplish what Congressman Reece seems to have had in mind in referring in his statement for the Congressional Record to the Willard Tablet case. There the question was not one of dual jurisdiction over labeling. It concerned identical representations made in both labeling and advertising, and both the district court and the appellate court held that an administrative adjudication by the Federal Trade Commission, determining that a representation in advertising was not misleading, constituted *res adjudicata* which precluded courts of law from trying the truth or falsity of that same representation in labeling. If the Willard Tablet decision correctly states the law, this problem

will continue so long as the issue of the truth or falsity of a representation is tried in an administrative proceeding if it occurs in advertising, and in a judicial proceeding instituted by another administrative agency if it occurs in labeling.

In our judgment, the bill is calculated to impair the benefits to the public authorized by existing legislation for the control of foods, drugs, devices, and cosmetics. The bill would at best effect little if any improvement in the confused situation and attendant impairment of public protection that stem from the basic faults of differing procedures and divided responsibility for determining the truth or falsity of identical representations in labeling and advertising.

The Bureau of the Budget advises that there is no objection to the submission of this report to your committee.

Sincerely yours,

PAUL V. McNUTT, *Administrator.*

FEDERAL TRADE COMMISSION,
Washington, March 27, 1945.

MEMORANDUM FOR THE CHAIRMAN, COMMITTEE ON INTERSTATE AND FOREIGN
COMMERCE

In a letter dated March 2, 1945, from the chairman of the Committee on Interstate and Foreign Commerce of the House of Representatives, there was referred to the Federal Trade Commission for report, together with such comment as the Commission might desire to make, copy of H. R. 2390, Seventy-ninth Congress, first session, a bill to amend the act creating the Federal Trade Commission, to define its powers and duties, and for other purposes, introduced on February 27, 1945, by the Honorable B. Carroll Reece.

The Commission desires to submit the following comments upon the provisions of this bill:

The Federal Trade Commission Act presently provides that if, after notice and hearing, the Commission is of the opinion that a person is engaged in practices prohibited by the act, the Commission shall enter an order requiring such person to cease and desist such practices. Any person against whom an order to cease and desist is entered may obtain a review of the order in an appropriate circuit court of appeals of his own choice by the timely filing of a petition to review. The Commission is thereupon required to certify to the court the "entire record in the proceeding, including all the evidence taken." Upon receipt of the record, the court acquires "jurisdiction of the proceeding and of the question determined therein," and the "power to make and enter * * * a decree affirming, modifying, or setting aside the order of the Commission." The Commission's findings as to the facts, the statute provides, "if supported by evidence, shall be conclusive."

This is exactly the same procedure which has been applicable to the review of the Commission's orders under both the Federal Trade Commission Act and the Clayton Act for more than 30 years, and is substantially the same as that applicable to the review of orders of the National Labor Relations Board, the Federal Communications Commission, the Securities and Exchange Commission, the Interstate Commerce Commission, and other agencies. H. R. 2390, which applies only to the Federal Trade Commission, and only to orders issued by the Commission under the Federal Trade Commission Act, would make two important changes in this long-standing and more or less uniform administrative procedure. First, the statute's present provision that the Commission's findings as to the facts shall be conclusive if supported by evidence would be so amended as to make the Commission's findings conclusive only "if supported by the preponderance of the evidence." Second, the bill would authorize the reviewing court to make any such modification of the Commission's order as in the court's judgment "the circumstances of the case require." The purpose of these two changes, as stated by the author of H. R. 2390, is "To afford effective judicial review of the Commission's cease-and-desist orders."

In the opinion of the Commission the changes are both unnecessary and inadvisable.

It is common knowledge that the practice of Congress in entrusting to administrative agencies the enforcement of various statutes designed to give effect to congressional policy has lately been the subject of vociferous criticism in certain quarters. And such critics have contended that administrative findings as

to the facts possess a peculiar form of conclusiveness which makes them, for all practical purposes, virtually immune to effective judicial review. That is not true.

The statutory rule that the Commission's findings as to the facts are conclusive if supported by evidence has been uniformly construed to refer to substantial evidence, and this, of course, means substantial evidence in support of every essential fact. The courts therefore are not powerless to set aside a finding merely because there is some evidence to support it. Nor are they precluded from reviewing the entire record for the purpose of determining the substantiality of the evidence relied on in support of a finding.

"Substantial evidence," the Supreme Court has declared, "is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," and the rule that administrative findings are conclusive if supported by substantial evidence "does not go so far as to justify orders without a basis in evidence having rational probative force" (*Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197, 229, 230 (1938)). On the contrary, the evidence in support of such findings must be sufficiently substantial in character to justify, if the trial were to a jury, a refusal to direct a verdict against the agency (*National Labor Relations Board v. Columbian Enameling & Stamping Co.*, 306 U. S. 292, 300 (1939)). The question whether the evidence relied on is of such character is a question of law for the courts to determine. And in reaching their conclusion, they are at liberty to, and do, "examine the whole record" (*Federal Trade Commission v. Curtis Publishing Co.*, 260 U. S. 568, 580 (1923)), for "the persuasiveness of evidence may upon occasion be destroyed by analysis even though uncontroverted" (*Goodyear Tire & Rubber Co. v. Federal Trade Commission*, 101 F (2d) 620, 624 (C. C. A. 6, 1939), cert. denied 308 U. S. 557 (1939)).

It is true that the courts have intimated in a few cases—less than half a dozen of the more than 300 Federal Trade Commission cases decided by the courts—that if they possessed the fact-finding power granted the Commission by Congress, they might not have made the findings of fact made by the Commission. But the courts have not hesitated to set aside the Commission's orders when they were of the opinion that the Commission's findings were not supported by substantial evidence. And there is no case on record in which any court has sustained, or announced itself powerless to vacate, findings which in its opinion were unreasonable. So far, then, from possessing any peculiar immunity from judicial review, the Commission's findings are subject to exactly the same rule as that which applies "in a review of cases tried to a jury" (*Stonewall Cotton Mills v. National Labor Relations Board*, 129 F. (2d) 629, 631 (C. C. A. 5, 1942), cert. denied 317 U. S. 667 (1942)), in which, as the Supreme Court declared in *Tennant v. Peoria & Pekin Union Ry.*, 321 U. S. 29, 35 (1944)) :

"The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses * * * and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. * * * Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

Thus, the rule applicable in respect of the Commission's findings as to the facts comes to no more than this: If reasonable men, acting reasonably, could have reached the same conclusions and made the same findings as did the Commission, the courts will not disturb the Commission's judgment. The courts will determine for themselves, however, upon the basis of the whole record, whether reasonable and unbiased minds could have reached the same conclusions as the Commission, and if the courts think not, they will set the Commission's findings aside. In these circumstances, it would seem clear that the Federal Trade Commission Act already affords "effective judicial review" of the Commission's findings, and the enactment of H. R. 2390 is therefore not necessary to secure such review.

It is believed also that the bill is unwise.

The meaning of the phrase "preponderance of the evidence" is a matter on which courts are not in complete agreement (32 C. J. S., Evidence, sec. 1021), and the "preponderance" rule has been criticized as one apt to lead the courts "close to the danger line of the fallacious * * * theory" that the weight of the evidence lies with the side which offers the greater quantity of testimony

or the greater number of witnesses (4 Wigmore, Evidence (3d ed., 1940) sec. 2498, p. 334). H. R. 2390 would therefore substitute for the definite and certain "substantial evidence" rule, a rule indefinite in meaning and uncertain in effect. Because of its close relation to the fallacious "quantitative and numerical" theory of evidence, adoption of the "preponderance rule" would inevitably and materially increase the length of the record in Commission proceedings, unduly prolong the trial of cases, and increase the expense of litigation. It would also probably result in a greater number of Commission cases being taken to court, and it would certainly greatly increase the work of the already overburdened courts in requiring them—contrary to established appellate practice—to weigh the evidence, determine the credibility of witnesses, and absorb to a material degree the fact-finding function which the Commission has performed successfully and with little criticism for more than 30 years.

The proposal, in section 1 of H. R. 2390, to authorize the courts to modify the Commission's orders "as in [the courts'] judgment the circumstances of the case require" is likewise unnecessary to secure "effective judicial review" of the Commission's orders.

It is well settled "that it is for the courts to determine what practices or methods of competition are to be deemed unfair," i. e., whether a person has violated the law, *Federal Trade Commission v. Keppel & Brother* (291 U. S. 304, 314 (1934)); *Federal Trade Commission v. Gratz* (253 U. S. 421, 427 (1920)), and the Commission's judgment in that respect, while entitled to weight, is not at all conclusive upon the courts. Where the Commission has properly concluded that a person is violating the law, however, it has been held that the Commission may exercise its discretion in so drafting its orders to cease and desist as to afford the public effective relief, and the courts will not disturb its judgment as to the remedy prescribed unless the Commission has abused its discretion.

This rule is by no means unusual or exceptional. It is precisely the same as that applied in reviewing decrees of United States district courts under the Sherman Act, decisions of the Tax Court, and the administrative orders of various commissions. Nor is the rule a recent development in the law. More than 40 years ago, in *Bates & Guild Co. v. Payne* (194 U. S. 106, 108-109 (1904)), the Supreme Court said that it had long been established "that where Congress has committed to the head of a department certain duties requiring the exercise of judgment and discretion, his action thereon, whether it involves questions of law or fact, will not be reviewed by the courts, unless he has exceeded his authority or this court should be of opinion that his action was clearly wrong."

The reason for the rule is both obvious and sound. It was designed to secure uniform and efficient enforcement of such statutes as the Federal Trade Commission Act by delegating their administration to a single body "specially competent to deal with them by reason of information, experience, and careful study" (*Federal Trade Commission v. Keppel & Brother*, 291 U. S. 304, 314 (1934); *Humphrey's Executor v. United States*, 295 U. S. 602, 624 (1935)). That end, obviously, cannot be attained if administrative functions are to be delegated to 11 different circuit courts of appeals.

In the course of a year not one circuit court of appeals normally reviews as many as a half dozen Commission cases; and a number of them review, on the average, only one case every 5 or 6 years. The Commission, on the other hand, disposes of some 200 litigated cases annually. Moreover, the Commission annually investigates thousands of applications for complaints. After investigation, a majority of such matters are closed without corrective action by the Commission because the charges in the applications are not sustained, the matter is a private controversy or is trivial in character, no interstate commerce is involved, or because of the absence of public interest. With respect to the cases in which the Commission decides to take corrective action, it grants the proposed respondents the privilege of adjusting the matters by stipulations to cease and desist, except in cases involving intent to defraud or mislead; false advertisement of food, drugs, devices, or cosmetics which are inherently dangerous to health; suppression or restraint of competition through conspiracy or monopolistic practices; violations of the Clayton Act; violations of the Wool Products Labeling Act of 1939 or the rules promulgated thereunder; or where the Commission is of the opinion that such procedure will not be effective in preventing continued use of the unlawful method, act, or practice. The vast majority of such cases are disposed of by the execution of stipulations in which the proposed respondents agree to cease and desist from the continued use of the unfair methods or unfair acts or practices in question.

With respect to the cases in which formal proceedings are instituted and the cases tried before the Commission, a relatively small percentage appeal from the decisions of the Commission, notwithstanding the fact that every respondent has the undisputed right to appeal for a review of the Commission's cease-and-desist order to a United States circuit court of appeals and his own selection. In a large number of the cases that finally reach the courts, the facts are not disputed.

In the circumstances, and without intending any reflection whatever upon the courts, it would seem that the Commission is peculiarly qualified, as "a body of experts * * * informed by experience" *Humphrey's Executor v. United States* (295 U. S. 602, 624 (1935)), to fashion the remedy to be applied in its proceedings. It is entirely fit and proper that the courts have, as they do, the power to modify the Commission's orders if they deem them arbitrary or unreasonable. But it is an entirely different thing to vest them with the power to substitute their judgment for the expert judgment of the Commission, with the result that upon identical facts the Commission's orders may be modified to read and apply differently in different circuits. As long as the courts possess the power to correct an abuse of discretion on the part of the Commission by modifying unreasonable orders, it cannot be said that there is no "effective judicial review" of the Commission's orders merely because as between two or more reasonable alternative remedies the one chosen by the Commission might not have been chosen by the courts.

Congress created the Federal Trade Commission as a "quasi-judicial and quasi-legislative" agency charged with the enforcement of the policy of the law as laid down by Congress. Both Congress and the courts have refused to subordinate the Commission to Executive control (*Humphrey's Executor v. United States* (295 U. S. 602, 624 (1935))). Whether it shall be subordinated to the judiciary is for Congress to determine. But the experience of 30 years would seem to prove the fairness of the review procedure which Congress has seen fit to prescribe, and to demonstrate that it is neither necessary nor desirable to transfer to the courts, as would H. R. 2390, administrative functions of the Commission and thus make the Commission, in a very real sense, little more than an instrument to take testimony for the ultimate action of the courts.

Section 2 of the bill purports to amend section 5 (1) [one] of the Federal Trade Commission Act, but the section proposed to be amended, which deals with civil penalties, is section 5 (1) [c 11]. This amendment reduces the amount provided for each violation of an order to cease and desist after it has become final from \$5,000 to \$1,000, and, in addition, provides that the penalty is "not to exceed the sum of \$10,000 in the aggregate." A penalty of \$1,000, with an aggregate limit of \$10,000, would be wholly inadequate effectively to prevent violations of many of the Commission's orders, particularly in cases where large corporations combine and conspire to control the market, divide territory and fix and enhance prices to the consuming public. It should be noted that the amount provided under the act as amended March 21, 1938, is a maximum, and it is within the discretion of the Federal courts to assess any penalty less than the maximum. The total amount of penalties fixed by the courts in all cases heretofore adjudicated has been quite reasonable, the courts taking into consideration the financial condition of defendants and other appropriate circumstances. In some civil penalty suits the amount of the penalties assessed has not been more than \$50 or \$100 for each violation.

On the other hand, in combination and conspiracy cases, where prices to the consuming public are fixed and enhanced, the maximum penalty of \$10,000 would be wholly inadequate and would operate as a license rather than as a penalty. It should be understood that the Commission has no authority to impose any penalties, but all such penalties are imposed by Federal courts in appropriate proceedings instituted by the Department of Justice.

Experience in the enforcement of this section of the Federal Trade Commission Act since its enactment has disclosed no basis for changing the amount which Congress, after careful consideration, felt was necessary adequately to prevent violation of order which have become final.

Section 3 of the bill amends section 15 of the Federal Trade Commission Act, which section deals with the definition of "false advertisements," by striking from the act, after the words "fails to reveal facts material in the light of such representations," the following, "or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions

as are customary or usual." In lieu of the stricken language the bill would substitute the following: "* * * so as to prevent deception resulting from indirection and ambiguity, as well as from statements which are false." The adoption of this amendment would limit the responsibility of the advertiser to the affirmative representations made directly or by implication, and would make it impossible to require those who advertise potentially dangerous drugs or devices to disclose to the public the consequences which may result from the use of their products under the conditions prescribed in the advertisement or under such conditions as are customary or usual.

The general public knows little of the effects which may result from the use of drugs and therapeutic devices. In drafting the existing statute the committee and Congress recognized the definite need of members of the public to be informed of serious potential dangers existing in the use of the drugs and devices advertised for their use. The amendment now proposed would deprive the public of the protection wisely provided by the present law. The effect of the proposed amendment can best be illustrated by reference to actual cases. For example, in Docket 3841, advertisements offering a preparation as a treatment for delayed menstruation were found to be false because they failed to reveal that its use as directed or under customary and usual conditions may result in a number of serious consequences to the user. The respondent was ordered to reveal that the use of the preparation "may cause gastrointestinal disturbances and excessive congestion and hemorrhage of the pelvic organs, and in the case of pregnancy may cause uterine infection and blood poisoning." In Docket 4363, a preparation containing desiccated thyroid extract was offered as a treatment for obesity. It was found that if used under the conditions prescribed in the advertisements or under customary or usual conditions the preparation "may produce nausea, vomiting, headaches, muscular and articular pains, vertigo, insomnia, physical exhaustion, tremor, tachycardia, and angina pectoris" and "may result in thyroid toxicosis, permanent injury to tissues, organic functions, and the entire body mechanism, and irreparable injury to the heart muscles, with auricular fibrillation." The order required that advertisements of this preparation reveal that its use "may result in permanent injury to the heart, thyroid gland, and other vital organs." In these and large numbers of similar cases adoption of the proposed amendment would leave the sellers free to advertise dangerous products to the public without warning. Frequently such preparations are sold by mail order and the only warning which such purchasers receive before purchasing the product would be the warning contained in the advertisements.

Many of the potentially dangerous drugs and devices which are offered to the public as a means of self-medication can be successfully advertised and sold without making any direct or implied representations that are false. If the protection now afforded by the statute should be removed, sellers could freely advertise drugs and devices which are potentially dangerous when used as directed or in a customary and usual manner, without notice or warning of the inherent dangers. The Commission views this proposal as one which would substantially lessen the effectiveness of the protection to the public health provided by the committee and Congress in the amendments of March 21, 1938.

Section 4 of the bill provides for a new subparagraph defining the term "labeling" as it is defined in the Federal Food, Drug, and Cosmetic Act, approved June 25, 1938. The Commission in all of its proceedings has adopted and followed the definition of "labeling" as it appears in the Federal Food, Drug, and Cosmetic Act, and the courts have likewise adopted and followed this definition. The Wheeler-Lea amendment to the Federal Trade Commission Act and the Federal Food, Drug, and Cosmetic Act were both passed at the same session of Congress, and, so far as sections 12 to 15 of the Federal Trade Commission Act are concerned, this act is in part *pari materia* with the Federal Food, Drug, and Cosmetic Act, and therefore the definition of labeling appearing in the latter act must necessarily govern as to both. Consequently, there is no occasion or necessity for presently amending the Federal Trade Commission Act to include a definition of the term "labeling."

Section 5 of the bill proposes the addition of a new section to the Federal Trade Commission Act reading:

"SEC. 19. Food, drugs, devices, and cosmetics shall be exempt from the provisions of this act to the extent of the application or the extension thereto of the Federal Food, Drug, and Cosmetic Act, approved June 25, 1938, as amended (U. S. C., title 21, ch. 9)."

The effect of this amendment would be to remove from the Federal Trade Commission such jurisdiction as it now has over false labeling as an unfair method of competition under section 5 of its act. While the Wheeler-Lea amendment of 1938 defined a "false advertisement" of food, drugs, devices, and cosmetics under sections 12 to 15 of the Federal Trade Commission Act as "an advertisement other than labeling," the Commission's jurisdiction to prohibit false labeling, when used as an unfair method of competition under section 5, was not disturbed.

In the case of *Fresh Grown Preserve Corporation et al. v. Federal Trade Commission* (125 F. (2d) 917) the United States Circuit Court of Appeals for the Second Circuit said:

"This argument, however, fails to take due account of two things. One is that the petitioners' conduct as found by the Commission[er] amounted to unfair methods of competition in commerce in violation of section 5 of the act (15 U. S. C. A., sec. 45) and the other that the definition of false advertisement in section 15 is expressly limited to that term as used in sections 12, 13, and 14. The courts have repeatedly upheld the jurisdiction of the Commission to prevent unfair competition by means of false labeling and misbranding regardless of the kind of the product (*F. T. C. v. Winsted Hosiery Co.*, 258 U. S. 483 (4 F. T. C. 610) ; *Royal Baking Powder Co. v. F. T. C.*, 281 Fed. 744 (C. C. A. 2) (4 F. T. C. 614) ; *F. T. C. v. Morrissey*, 47 F. (2d) 101 (C. C. A. 7) (14 F. T. C. 716) ; *F. T. C. v. Good-Grape Co.*, 45 F. (2d) 70 (C. C. A. 6) (14 F. T. C. 695)). The last three of the cited cases dealt with unfair competition in the sale of food products. Since the Wheeler-Lea amendment of March 21, 1938, we have three times upheld this jurisdiction of the Commission (*Fiorot Sales Co., Inc., v. F. T. C.*, 100 F. (2d) 358 (27 F. T. C. 1702) ; *Justin Haynes & Co., Inc., v. F. T. C.*, 165 F. (2d) 988 (29 F. T. C. 1578) ; *Parfums Corday, Inc., v. F. T. C.*, 120 F. (2d) 868 (33 F. T. C. 1797)). One of these cases dealt with a drug and the other with cosmetics. See also, *Federal Trade Commission v. Kay* (35 F. (2d) 160 (C. C. A. 7) ; another drug case, 13 F. T. C. 575).

"The amendment to section 5 (15 U. S. C. A. 45) of the act did not modify the term 'unfair methods of competition in commerce,' but made unlawful what were called 'unfair or deceptive acts or practices in commerce,' and by so doing enlarged instead of lessened the scope of the jurisdiction of the Commission. The additions found in sections 12 to 15, inclusive, were also to give the Commission greater control over the advertising of food, drugs, cosmetics, and the like by providing for criminal action as well as injunction; and only in proceedings under such sections is the definition of false advertisement in section 15 relevant, not in a proceeding like this under section 5.

"The only proof of advertising was the interstate sending by the petitioners of price lists to their customers in the wholesale and retail trade describing their products as pure fruit preserves, and the representations to like effect by salesmen to such customers. We need not now decide whether that was advertising in violation of sections 12 to 15, inclusive. Like false labeling, it may have been deceptive and have amounted to unfair competition under section 5, and we need now be concerned with nothing more."

The Commission, as the circuit court of appeals held, *supra*, retains jurisdiction over the false labeling of all commodities under section 5 of its act, where such false labeling is an unfair method of competition. It cannot successfully be contended that in dealing with false labeling as an unfair method of competition under section 5, the Commission has acted in an unreasonable manner or in any way that conflicts with the jurisdiction of the Food and Drug Administration over false labeling. To restrict the Commission, as these two sections of the bill would restrict it, would to that extent prevent it from affording that degree of protection to the public that it has in the past.

The Commission is, consequently, of the opinion that the amendments to the Federal Trade Commission Act proposed in H. R. 2390 are both unnecessary and unwise, and are not in the public interest. Furthermore, section 3 would seriously weaken that provision of the present law which was and is especially designed to protect the health of the consuming and using public.

In accordance with your request, this report and comments on the bill are transmitted in duplicate.

By direction of the Commission.

EWIN L. DAVIS, *Chairman.*

I understand Dr. Stason is our first witness.

STATEMENT OF DR. E. BLYTHE STASON, DEAN, LAW SCHOOL,
UNIVERSITY OF MICHIGAN

Dr. STASON. Mr. Chairman and members of the committee, I have come down here without any prepared statement whatsoever because I haven't known just what the committee wanted me to direct my attention to.

The CHAIRMAN. Doctor, we will let you pursue your own course.

Dr. STASON. Very well. Unless the committee, then, wants me to proceed in some other manner, I shall first direct my attention to certain logical defects, we may call them, in the portions of the Federal Trade Commission Act concerning which I shall speak; then, thereafter, if the committee wants to hear me on the subject, I will state what I would do about it.

In the first place, let me say that my approach to this subject is not that of a practitioner before the Federal Trade Commission. I never have tried a case before the Commission, and I never expect to do so. I have never been connected with the Commission in any way, and I suspect that I never shall be. I am a professor of law, and therefore my approach to the subject can possibly be called quite academic. At least, it is objective.

Mr. REECE. Mr. Chairman, might it not be very well for Dean Stason to give a résumé of his background for the record at this time?

Dr. STASON. I shall be very glad to do that.

Mr. REECE. As I understand, among other things, you were on the Attorney General's Committee on Administrative Procedure.

Mr. STASON. I will give the background, Congressman Reece. For about 23 years I have been a professor of law at the University of Michigan. At the present time, and for the last 7 years, I have been the dean of the law school. For about 21 years I have taught the subject of administrative law in the law school. I have also taught such other related subjects as taxation and constitutional law and legislation. In fact, at one time or another I have taught most of the subjects in the curriculum. In 1939, I was made a member of the so-called Attorney General's Committee on Administrative Procedure, the committee that was appointed by the Attorney General on direction from the President. That committee filed its well-known report in 1941. I was one of the four persons who are characterized as of the minority of that committee, which will show possibly that at least I was not in conformity with the majority. I am also a member of the National Conference of Commissioners on Uniform State Laws, and in that organization I am chairman of the subcommittee that has charge of the drafting and formulation of a model uniform administrative procedure act. In addition to those activities, I am the author and editor of a book on administrative tribunals, and I have written a considerable number of law-review articles on the subject.

So my background is quite theoretical, and I state that so there will be no misconception of my position.

The purpose of bill H. R. 2390 deals with a number of sections of the Federal Trade Commission Act, and it proposes, I believe, to add a section to it. I am going to confine what I have to say to just one portion of the proposed act, namely, the proposed amendments to sec-

tion 5 (c) of the act. The other features, namely, section 15 of the act, and the proposed new section 19, I am not sufficiently familiar with to be able to make any satisfactory contribution.

I am going to deal with what appear to me to be four features of the Federal Trade Commission practice under section 5 (c) that are justifiably the subject of criticism.

First, section 5 (c), as it is now written, provides for judicial review, of course, and with respect to the review of the facts it contains a provision that the findings of the Commission as to the facts, if supported by evidence, shall be conclusive. That language dates back to the adoption of the original act in 1914, at which time the word "testimony" was used instead of the word "evidence."

That phraseology is, on the face of it, broad enough to limit the court's authority on judicial review to what the lawyer speaks of as the scintilla rule; that is to say, any evidence would, on the face of the language, suffice to sustain a conclusion on the question of fact.

Now, the courts have construed the language so as to read in before the word "evidence" the word "substantial," so that I think we may now say that by virtue of the court decisions, mostly under the Labor Act, it is true, but by virtue of the court decisions, the findings of fact are conclusive, if supported by substantial evidence.

However, that term is vague enough in itself, and it has certain features that, in my judgment, need correction. Among other things, at the present time some of the courts have been thinning out the meaning of "substantial evidence" by adopting these tactics—at least, so it seems from their written opinions—adopting the practice of examining the record to find whether or not there is in the record any evidence in support of the conclusion of fact. If such evidence is found, regardless of the weight of the countervailing evidence, the decision is said to be sustained by substantial evidence.

There seems to be some justifiable criticism of that practice. Possibly the courts do not even intend it to be that way, but some clarifying language would certainly be of merit.

So the first of the features of section 5 (c) concerning which I would speak is the phraseology "supported by evidence." Later I will try to describe what I think might well be done with it.

The second feature is this: Under current judicial opinions, the court review does not apparently extend to what the courts are calling inference from the facts. Again and again, in recent years, we find the courts, including the Supreme Court of the United States, saying something like this—and this is quoted from Justice Douglas in the Link-Belt case:

Congress entrusted the Board, not the courts, with the power to draw inferences from the facts.

This is a quotation from Judge Allen, in the United States Truck case, in the sixth circuit:

While the findings of the Board are claimed to be unsupported by substantial evidence, and the long history of known hostility to unionization shown by the respondent is impressive, nevertheless the findings are in general supported by inferences which the Board has a right to draw, and which this court has no right to review.

That is a Labor Board case, but the language of the Labor Act is quite like the language of the Trade Act, so that the cases in the two fields may be interchanged.

In other words, courts in recent years have been saying at least that the inference to be drawn from the facts are not for the court to review; they are conclusive.

Now, suppose by a process of inference, the use of circumstantial evidence, we reach what we speak of as the ultimate facts in a controversy, and if the process of inference is completely foreclosed by the terms of the present section 5 (c), a very important area of fact determination is foreclosed from court review.

So I should think the second defect in the phraseology of section 5 (c) is failure to make clear that the inference to be drawn in arriving at the ultimate facts from the evidentiary facts is just as much subject to court review as any other portion of the facts determination.

The CHAIRMAN. Doctor, would it be agreeable to you if we were to ask questions as you proceed?

Dr. STASON. I wish you would, please.

The CHAIRMAN. Do you have in mind the particular facts the judge spoke of as being inference instead of direct facts which the court could consider, in the Truck Co. case? The facts that brought about that statement?

Dr. STASON. In the United States Truck Co. case to which I referred the statement was dictum. The court in that case set aside a cease and desist order of the National Labor Relations Board because the decision of the Board required the reinstatement of two employees who were found rather clearly to have been guilty of intoxication while on duty, and therefore, being under the influence of liquor, they were operating motortrucks contrary to the provisions of the Motor Vehicle Act.

She set aside the order in that case, and therefore her statement was dictum. I cannot at the moment recall from any specific case the precise illustration for which you ask, but I can easily suggest an hypothetical possibility for illustration purposes.

Take a case arising under the sections of the act having to do with deceptive practices. The facts are usually fairly easily ascertained. The question is whether the facts, as ascertained, have a tendency to deceive the public. The tendency to deceive is the ultimate fact. However, one reaches that conclusion from the evidentiary facts. The conclusion of fact that is reached by the inference process is really the heart of the whole matter and unless the court has authority to review the process of inference the court's powers are very restricted indeed.

Does that illustrate the point?

The CHAIRMAN. Circumstantial evidence is largely establishing facts by inference, is it not?

Dr. STASON. That is correct.

The CHAIRMAN. Would you understand the court's decision to limit the consideration of circumstantial evidence in making this decision?

Dr. STASON. No; circumstantial evidence may be considered by the Commission, but the inference drawn by the Commission from circumstantial evidence cannot be reviewed by the court, if one follows and believes the language that has been used in at least a half dozen of these recent cases.

The CHAIRMAN. Do you interpret those decisions as precluding the court from considering circumstantial evidence in a case?

Dr. STASON. No, the court can consider circumstantial evidence in that type of situation as in any other type. I think, perhaps, we are not speaking to a common point. Circumstantial evidence is just as usable in a Federal Trade Commission proceeding as in any other type of judicial controversy or quasi-judicial controversy, and it can be used to support a cease and desist order, or it can be used to bring about the setting aside of an order. The objection that I am taking, however, is at a little different point. The courts say that an inference to be drawn from the factual evidence in arriving at a conclusion of fact is for the Commission and not for the court. In other words, the court is precluded by these statements from reviewing the process of fact determination between the evidentiary fact and the ultimate fact.

The CHAIRMAN. Yes; I understand that. The question I was getting at is whether the court, in effect, in reviewing a case on appeal is denied consideration by it of circumstantial evidence. I would regard circumstantial evidence to be just as much evidence as the direct fact.

Dr. STASON. So would I.

The CHAIRMAN. Is the court denied consideration of what we ordinarily call circumstantial evidence?

Dr. STASON. Yes, sir; it seems to me it is.

The CHAIRMAN. Or inferences from the facts?

Dr. STASON. It seems to me the language of at least a half dozen well reasoned recent cases point that way.

The CHAIRMAN. Has that been the conclusive or determinative point in those cases?

Dr. STASON. It is difficult to tell, Mr. Chairman. The cease and desist orders, both in Labor Board cases and Commission cases, have been sustained. In sustaining the orders the courts' opinions have said the inferences are not for the court to pass upon. Whether the court's feeling that it cannot pass upon the inference has been the concluding factor is impossible to say without going back of the opinion. And that I have not done.

Mr. ROGERS. What kind of rule would you lay down as to drawing inferences?

Dr. STASON. I beg your pardon?

Mr. ROGERS. What sort of rule would you lay down as to the drawing of inferences?

Dr. STASON. I would say that the inference drawn by the Commission from the evidentiary facts should be subject to the same standard of judicial review as that which is applied to the evidentiary facts themselves. In other words, I can't distinguish, in my thinking, between the portion of the process of fact determination which involves the drawing of an inference from evidentiary facts from the determination of the evidentiary facts themselves. I would treat them all alike.

Mr. O'HARA. Dean, I notice you use the term "circumstantial evidence." My experience with that term in my State is that it applies only to criminal cases. I have never heard of a civil case in my State where they used the words "circumstantial evidence." Is that a common use of the term in this Federal Trade Commission practice?

Dr. STASON. I think the term that is used is "drawing inferences"—that is the expression, "drawing inferences from the evidentiary facts." I use the term "circumstantial evidence" because it is a convenient legal concept to express an idea. I know of no reason, however, why the term "circumstantial evidence" should not be used in civil proceedings at law as well as criminal proceedings.

Mr. O'HARA. That may be true, but I wonder if it isn't generally considered to be a term used in criminal practice.

Dr. STASON. No; I think the term "circumstantial evidence" is one of universal application instead of being limited to just criminal proceedings. In any event, that is the way I use it.

Further, just to conclude that discussion of the drawing of inferences, I have here in my notes a quotation from the so-called Medo case, in which Justice Stone said—this was a 1941 case, I believe. He used this kind of language, and, again, I don't think it can be called more than dictum:

It has now long been settled that the findings of the Board (Labor Board), as with those of other administrative agencies, are conclusive upon the reviewing courts when supported by evidence, that the weighing of conflicting evidence is for the Board, not for the courts—

and this is the point:

* * * that the inferences from the evidence are to be drawn by the Board and not by the courts, save only as questions of law are raised, and that upon such questions of law the experienced judgment of the Board is entitled to great weight.

Mr. REECE. As I understand, from your statement of that interpretation, the court need only read one side of a case, and if it finds any substantial evidence in it the administrative action taken is sustained without weighing the relative strength or preponderance of evidence.

Dr. STASON. I think as the term "substantial evidence" is being construed in some courts today, that is true. I don't think that is done in all the courts, and I think there is a great deal of vagueness and uncertainty as to just what should be done. The phrase used is "conclusive if supported by evidence." The courts have put in the word "substantial" so that as amended by judicial interpretation, it reads "shall be conclusive if supported by substantial evidence."

Now, the question is, what is substantial evidence? I think there have been decisions rendered in the last 10 years in which the courts have examined the record on one side and found substantial evidence present and sustained a decision without too much, if any regard, for the weight of the countervailing evidence. However, I don't believe that is what substantial evidence means, or ought to mean, and I am glad to say I don't think it is by any means always interpreted that way. I think it is more or less a sporadic decision that goes off that way.

Mr. O'HARA. Dean, may I direct your attention to one view? Under the practice established, appeals from administrative decisions are only to circuit court of appeals, and from fact-finding bodies in the States there are so many cases where the appeal is to the appellate court, only, and where there is a question of whether there is any evidence to sustain the triers of the facts, I think some very unfortunate results have come from that procedure, if I may say so, be-

cause you find a reviewing court in a State, or the circuit court of appeals in a circuit, finding some small bit of evidence and saying, "Well, you might have found differently, but there is some evidence to sustain the triers of facts." I think the damage is done in regard to the finding of some small bit of evidence which is greatly outweighed by other evidence, and the remedy is gone when you go to the circuit court of appeals or appellate court as the case may be. They may make their decision on some small bit of evidence. I think in some of these cases that arise until we get a trial de novo, it is going to be difficult for Congress to afford relief on some of these complaints of administrative injustices. Do you agree with me or not?

Dr. STASON. No; I don't agree that a trial de novo is the solution. I would add a qualification to that, and, if I may, I would rather explain it a little later.

Mr. O'HARA. Very well.

Dr. STASON. The third defect in section 5 (c) to which I would refer has to do with the possibility of court review of the remedy that is ordered by the Commission. The Commission, of course, enters its cease-and-desist order. The court is given the power to reverse, affirm or modify, subject to the provision that the decision on questions of fact, if supported by evidence, shall be conclusive. The courts have been construing that power to modify in a rather restrictive way. In fact, the courts have said in recent years that the question of the remedy to be applied is discretionary or should be discretionary with the administrative agency, and being discretionary, should not be subject to judicial review. As a consequence, the power of the court is circumscribed, and if it decides that the fact decision is supported by substantial evidence, that there are no errors of law, it must sustain the cease-and-desist order, even though the remedy which is prescribed goes beyond what seems to be the reasonable needs of the case.

I quote from the A. P. W. Paper Co. case, a 1945 case:

The present order goes beyond permissible limits in forbidding any use of the words "Red Cross." Accordingly, the order must be reversed and the case remanded to the Commission for the entry of an order which will not infringe the rights of the petitioner under the Red Cross Act above considered. We do not ourselves attempt to formulate a new order, because our recent decisions have held that the measure of the necessary relief is peculiarly within the competence of the Commission.

Now, ever since the decision, 5 or 6 years ago, by Judge Hand, in the so-called Herzfeld case, it has become increasingly clear that the question of the remedy is one which the courts deem to have been left within the discretionary control and power of the Commission, that the court should not intervene at that point, even though it deems the remedy unduly harsh and severe.

Those are three of the features of section 5 (c) to which I refer as seeming to need statutory decision.

Now, there is the fourth, and the last proposition that I would like to make, and that is this: The Federal Trade Commission process, beginning with the issuance of the complaint and ending with the entry of a cease and desist order, is a very thorough process indeed, handled with great skill, and yet to an outsider like myself, it doesn't look like a properly developed quasi-judicial procedure. It is a very high-class investigatory procedure. It lacks many of the essential elements of fairness that should be there in a quasi-judicial process.

Now, to be somewhat more specific. In the first place, the issuance of the complaint is passed upon by the Commission. The Commission itself becomes the grand jury in the proceeding. Then in the second place, the trial examiner is no real authority. He presides over the taking of testimony; he has no power to rule on motions; just as he has no power to enter a recommendation involving a conclusion of fact or law. In the third place, there is nothing like an intermediate report submitted either by the examiner or by the Commission, giving a statement of the conclusions of law to be drawn tentatively from the facts, and, as a consequence, there is very little before the Commission at the final hearing, for counsel for the respondent to bite into, and there is very little by way of framework on which the Commission itself can work in hearing the argument and formulating its decision.

Mr. O'HARA. May I ask a question there?

Dr. STASON. Yes.

Mr. O'HARA. Does the examiner rule upon questions of admissability of testimony?

Dr. STASON. Yes. The process does not, therefore, result in a thoroughgoing trial at any stage, but in addition, because of the organization of the process it has a strong tendency to reduce the confidence that should be engendered by all tribunals that have quasi-judicial or judicial functions and powers.

Now, those are the four phases of section 5 (c), and the last, of course, deals with the general process leading up to the cease and desist order to which I would refer.

Now, may I take up the other side of the picture and offer a few observations concerning what might be done to deal with the situation?

May I turn now to H. R. 2390, and particularly to section 5 (c) thereof. I will address myself to the phases of the proposed amended bill in the same order as I discussed the defects, as I see them.

First, regarding the proposal concerning the standardization of review of questions of fact. Lines 22, 23, and 24, page 2, constitute the revision and provide that—

The findings of the Commission as to the facts, if supported by the preponderance of the evidence, shall be conclusive.

A question was asked a short time ago as to whether or not I would be inclined to favor a trial de novo. I answered no, with a qualification. This sentence that I have just read, the preponderance of evidence sentence, would, in effect, make the court proceeding a trial de novo on the same record as that prepared by the Commission, instead of being a trial de novo in the sense that new testimony is taken. It would be a trial de novo, excepting that the record would be prepared by the Commission.

I would agree that the preponderance of the evidence rule is satisfactory, and indeed justifiable, if the Commission continues to retain its present administrative process.

I have just referred to the defects as I see them in the process, beginning with the complaint and ending with the cease and desist order. I say it is a splendid investigatory process, but it is not a quasi-judicial proceeding. If the Commission continues to follow such an investigatory process, leading up to its cease and desist order, then it seems to me there is very strong justification for a review by the courts on a

preponderance of the evidence. However, as an academic person, I would hope that the time would come when the Federal Trade Commission for one reason or another would adopt a more satisfactory quasi-judicial process, and if it should do so, I would favor a more limited judicial review of the facts.

Now, to be specific, there is before the Congress at the present time a bill known as the McCarran-Sumners bill. I know it by its Senate number only, S. 7, but I understand a corresponding bill has been introduced in the House of Representatives also.

The McCarran-Sumners bill is a bill which very carefully attempts to prescribe the course of procedure to be followed by an administrative agency—not only the Federal Trade Commission, but most other administrative agencies—between the time of the initiation of a proceeding and the entry of the final order. There is a great deal in that bill that is worthy of enactment.

If that bill should become law, and it is my understanding that it is being given very careful consideration in committee at the present time, then certain very marked improvements would be made in the administrative process of the Commission itself.

One section of the bill provides rather carefully for a separation of the functions of the investigatory staff and the trial staff. Another section of the bill empowers the examiner to control the trial far more than an examiner of the Federal Trade Commission does today. He becomes, really, a judge in the proceeding; he has the power to issue subpoenas, to, of course, rule on testimony, to rule on motions and to enter a final decision on the facts and the law. Or, in the alternative, to prepare and submit a recommended decision. The examiner becomes under that McCarran-Sumners bill a real judge. He is the judicial authority.

In order to achieve judicial impartiality and independence, the bill makes some very specific provisions regarding the tenure and salary arrangements for trial examiners. They can be removed only for cause; their salaries are adjusted under regulations of the Civil Service Commission.

Should that bill become law, there would still be ample power in the responsible commission to control the situation. The Commission would have the authority on appeal from a decision of the examiner to review the whole record. Or, if the other course of procedure should be adopted and a recommended decision should be filed by the trial examiner, the Commission, of course, would enter the final decision. Whichever course is followed, when the proceedings get to the commission stage, they would be focused on either the decision of the examiner or a complete intermediate report, and the commission stage would be much like that of an appellate court in judicial proceedings.

No, I say if the McCarran-Sumners bill becomes law—and it is a bill that has been given the most careful consideration for many years—it will effectually improve the administrative process, and assuming that it applies to the Federal Trade Commission, I would say that the preponderance of evidence rule would no longer be necessary.

Instead, I would suggest something different. I would suggest a clear definition of the substantial evidence rule. And may I make that specific?

Mr. RABIN. You make that suggestion based upon the assumption that that bill will be passed?

Dr. STASON. That is right. On that assumption I would have a little different language in the review section, and if I may do so, I shall point out just the language I would use.

The CHAIRMAN. Very well.

Dr. STASON. The sentence that reads, "The findings of the Commission as to the facts, if supported by a preponderance of the evidence, shall be conclusive," lines 22, 23, and 24 of page 2, of H. R. 2390, I would revise to read as follows:

The findings, inferences, and conclusions of the Commission as to the facts shall be conclusive if, and only if, they are found to be supported by substantial evidence upon consideration of the whole record, or such portions thereof as may be cited by the parties.

May I read that again? Because there are two features of it to which I would refer more specifically, and I know how difficult it is to follow a long, complicated sentence.

The findings, inferences and conclusions of the Commission as to the facts shall be conclusive if, and only if, they are found to be supported by substantial evidence upon consideration of the whole record, or such portions thereof as may be cited by the parties.

That is the language I would use if the improved process of the McCarran-Summers bill should be effectuated either by the adoption of that bill or in some other way.

Mr. REECE. It would be your hope, in that event, that the language that you have suggested would accomplish the same purpose that the preponderance of evidence language as now embodied in the bill is intended to accomplish?

Dr. STASON. That is right. The change in the language, plus the change in the process, would accomplish the same objective.

You will notice that the proposed language achieves two purposes, and meets two of the four points that I made reference to as defects in the present law. First, the word "evidence"—

* * * conclusive of the facts, if supported by evidence—

is considerably modified and strengthened and clarified. It will be "substantial evidence" written into the measure and not just by judicial interpretation drawn in. Moreover, it will be substantial evidence upon the whole record, a phrase which has come to mean, in judicial parlance, more than the scintilla rule, more than an examination of the evidence on just one side, but an examination of the whole record on both sides. So that language would be my suggestion to cover the first two alleged defects.

Third, I want now to direct attention——

Mr. REECE. If I may interrupt again.

Dr. STASON. Yes.

Mr. REECE. As I recall, earlier you referred to the opinion rendered by Chief Justice Stone.

Dr. STASON. Yes.

Mr. REECE. My attention is called to that, and it reads this way:

It has not long been settled that the findings of the Board, as with those of other administrative agencies, are conclusive upon the reviewing courts, when supported by evidence, that the weighing of conflicting evidence is for the Board, not the courts, that the inferences from the evidence are to be drawn by

the Board and not by the courts, save only as questions of law are raised, and that upon such questions of law the experienced judgment of the Board is entitled to great weight.

Dr. STASON. Yes, sir. I think that is the same statement as the one I read awhile back. Shall I turn now to the third point?

The CHAIRMAN. Yes.

Dr. STASON. I will now direct attention to the question of remedy and the authority of the court, if any, to modify the remedy prescribed in the cease and desist order. As I said previously, the recent decisions have precluded the courts from dealing with the question of remedy. Lines 14, 15, 16, and 17, on page 2, of H. R. 2390, purport to deal with that problem.

The court—

shall have the power to make and enter upon the pleadings, evidence, and proceedings set forth in such transcript a decree affirming, setting aside, or modifying, as in its judgment the circumstances of the case require, the order of the Commission * * *.

Now, I think that the propriety of the remedy should be subject to some judicial control. I don't think it is sound to take the position that the remedy is exclusively for the Commission to determine and courts may not intervene even though the remedy is unduly severe. Of course, the courts may always intervene if there is an abuse of discretion, but that is a state seldom achieved. Therefore, I think the objective lying behind the addition of the words "modifying the order, as in its judgment the circumstances of the case require" has merit.

I am going to take the liberty, however, of pointing out one or two phases of that proposed amendment that I think are worthy of consideration. It is at least possible that the proposed language would be construed by the court to accomplish nothing more than was accomplished under the original language. At the present time the word "modifying" as set forth in section 5 (c) gives the court the power to affirm, modify, or set aside. The courts have really written that word "modify" out of the present section 5 (c), and there is at least a possibility that the courts will, with equal ease, read out the new clause "modifying, as in its judgment the circumstances of the case require." I will agree, of course, it would be somewhat more difficult to read out the new phrase for various reasons, but still it is a possibility.

On the other hand, suppose the court doesn't read it out. Suppose the court says that means that the discretion to deal with the remedy is now transferred from the Commission to the court. Is that what is really desired? Or is that going further than is wise in the premises? If the court proceeding is to be made virtually a trial de novo, then of course a broader concept of—the broader concept of a full discretionary power in the court is the correct one to pursue. On the other hand, if the court review is to be a review for the purpose of correcting palpable errors in a satisfactory quasi-judicial process, I believe the transfer of the full discretionary power from the Commission to the court is going too far.

Again that comes back to the question of what is going to be done with the McCarran-Sumners bill. Should the McCarran-Sumners bill be adopted, or should the procedure of the McCarran-Sumners

bill in some other way be effectuated by the Federal Trade Commission, I would suggest a little different treatment of the power to modify. And may I again make my suggestion concrete by reading from an interlineation in my notes?

I would let the sentence beginning on line 12, page 2, read as follows:

Upon such filing of the petition and transcript, the court shall have jurisdiction of the proceedings and of the question determined therein, and shall have power to make and enter upon the pleadings, evidence, and proceedings set forth in such transcript, a decree affirming, modifying, or setting aside the order of the Commission, or modifying the remedial provisions of the order, if they are deemed by the court to be unreasonably harsh or severe.

May I read that again? I would suggest those words read as follows:

The court shall have the power to make and enter upon the pleadings, evidence, and proceedings set forth in such transcript, a decree affirming, modifying, or setting aside the order of the Commission, or modifying the remedial provisions of the order, if they are deemed by the court to be unreasonably harsh or severe.

That would give the court the power to deal with the question of rationality of the remedy without putting upon the court the burden of determining the full limits of the remedy.

At the present time, under court decisions, the discretionary power over the remedy rests with the Commission, with no review by the courts. The proposed amendment, that is, H. R. 2390, would, if construed as I believe it is intended to be construed, transfer full discretionary power from the Commission to the court. As I have said, I think that goes too far if the Commission makes its process fairly quasi judicial. The proposal that I would make then is this: If the Commission does so, does come under the McCarran-Sumners bill, or the equivalent, the court be given the power to set aside the provisions concerning the remedy if it finds them to be unreasonably harsh or severe. In other words, the court does not manufacture the remedy, but it asks itself this question: Is this prescribed remedy, the remedy prescribed in the cease and desist order, one which a reasonable Commission might reasonably feel necessary to achieve a corrective result in this case? If so, it will be sustained. On the other hand, if the court should feel that the remedy set forth in the cease and desist order goes further than necessary to correct the evil discovered, is harsh and severe for the purpose of the case, it could modify the remedy accordingly.

The CHAIRMAN. Can you cite any other case in which, by statutory law, a court has similar control over remedies?

Dr. STASON. No; I cant, offhand.

The CHAIRMAN. Isn't the main purpose involved here to see that persons in interest are given a fair trial?

Dr. STASON. That is right.

The CHAIRMAN. In the judgment of the court, insofar as it can exercise judgment as to the facts? A litigant's interest is in a fair trial. These administrative agencies must be primarily responsible for the determination of facts. Then the fundamental function of the court is to protect him against injustice by the Commission. Isn't the protection of him, so far as the remedy is concerned, involved in that question whether he had a fair opportunity and had been treated fairly by the Commission?

DR. STASON. No, sir; I don't believe I would agree with that fully. It seems to me that a respondent before an administrative agency can be given a fair trial on the facts, the law can be fairly applied to the facts to reach a conclusion of guilt, and still he may be unfairly treated when the remedy is attached, when the penalty is prescribed by the agency having authority to prescribe the penalty. In other words, I think there are three stages where unfairness to a private respondent can result: Either in the determination of the facts, or in the application of the law to the facts, or in the terms of the penalty, or what I would call remedial measures.

Now we have felt that the Commissioners being expert, and having expert assistance available, are well qualified to deal with the fact issues, so we leave to them the determination of the fact issues, subject to a reasonable measure of judicial control to correct palpable errors. On the law questions the courts conventionally retain control and the statutes, in almost all instances, provide for review on questions of law.

Now we come to the third stage, namely, the remedy. Who is going to determine the question of what remedy is to be applied? Of course, in dealing with the problems that the Federal Trade Commission must deal with, its judgment concerning the appropriate remedy should be very good, and is very good, and should be given a high degree of authority. It should be given as high a degree of authority as its decisions on the facts, but there ought to be some control in the courts to prevent unreasonably harsh action. At the present time, as I read the cases, the courts are saying the question of remedy is entirely discretionary, it is entirely with the agency to determine. It seems to me that something a little more than that is necessary if a full measure of justice is to be afforded.

THE CHAIRMAN. Does your theory install the court as a substitute for the Commission?

DR. STASON. I don't think so. Not in the proposal I make, at least. It simply says this, that the court may modify the remedy if it finds it to be unreasonably harsh or severe. It is equivalent to the power of the court to set aside a decision on the facts, if it finds it to be contrary to the substantial evidence on the whole record.

MR. O'HARA. Dean, aren't you wavering a little bit in my favor for a trial de novo?

DR. STASON. A trial de novo to me, Mr. O'Hara, means a new trial on a proceeding in court with a record being built up in the court, and the court having full authority to deal with the questions of fact and law and remedy.

MR. O'HARA. I appreciate that, but, Dean, what is troubling me about your suggestion—and I have the greatest respect in the world for your suggestions—is that an important question of fact may be brought out in a case; the trier of the facts may have a witness on the stand; he observes him, and while that witness is not impeached, the trier of facts may discount that testimony 100 percent, whereas the appellate court may not do so. You suggest, if I follow you correctly, that very interesting contention here—a reviewing authority on the part of the court which goes beyond the question of law. What troubles me is you are giving in part a trial de novo power to the reviewing court, without saying so. You are limiting that court. I think prob-

ably it will be true—I don't know—that in a great many of these cases that are tried, they are not appealed. Occasionally you get the type of case where the person affected feels that the law has been misapplied, or there has been the taking of a small part of the testimony and basing a decision on it, when it is outweighed by other testimony. In either of those cases, Dean, it seems to me a complete remedy is only obtained by a trial de novo. I think if appeals were resorted to merely for the purpose of delay, it would be a bad situation, but I think in a serious case where you have a very close question of fact and a very close question of law, that actually the remedy for the person or corporation affected would be only by trial de novo. I don't wish to labor that point, but that is what troubles me.

Dr. STASON. There is a very important question of governmental policy that is involved in the situation that you have stated. The question is, What shall be the division of labor between the governmental agency with its technical staff and all of its equipment on the one hand, and the court on the other? Where shall the line be drawn?

Mr. O'HARA. No. It is a struggle between the three coordinated branches of our Government on the one hand, and a supergovernment called bureaucracy on the other. That is the way I view it. It is a very serious thing to my mind, of whether we are getting away from the theory of the legislative, executive, and judicial into another form of government that our forefathers never intended. We either maintain or destroy constitutional government.

Dr. STASON. Well, I have proceeded on the assumption that we have the administrative agencies as an essential part of our governmental scheme, and our best efforts should be devoted to making them work as fairly and effectually and effectively as possible, and to working out the wise dividing lines between their authority and the authority of the courts. Now, if we do adopt the principle of the trial de novo, then by so doing, you bring about several collateral results which may not be so good. In the first place, you burden the courts with a very considerable mass of litigation that the courts would find difficult to dispose of. And, in the second place, you would be taking the authority and responsibility away from the commissions, making it unlikely that they would be developed in an authoritative and responsible way. In the third place, you would by adopting the trial de novo technique put to one side whatever benefits might be obtained by the very large technical staff and equipment of the agency. So that it seems to me that the wise course to pursue is one short of trial de novo, is one of working out a division of labor by which the technical work will be done by the administrative agency, but the court will be given the power to check palpable errors wherever they arise, whether they arise in connection with fact issues or law questions or remedies. That is my theory.

Mr. ROGERS. Dean, just one question: Why, in your opinion, should this review be in the circuit rather than in a district court? Why should a man in my district have to travel long distances to get to a circuit court? Why shouldn't he be permitted to register his appeal in the district court?

Dr. STASON. That is a question that has some rather large implications. I suppose, in a brief sentence, the principal reason for going to the circuit court instead of starting in a district court and working

on up is one of expedition. It saves one step on the way to the Supreme Court, if it is the kind of case that is going to go there.

Mr. ROGERS. Then why not go direct to the Supreme Court?

Dr. STASON. Directly to the Supreme Court?

Mr. ROGERS. Yes; if you want to save steps.

Dr. STASON. I suppose the Constitution might prevent it. I am not arguing for it on that ground; I am simply trying to state the reasons why it is achieved in this way. Another reason is this: In connection with these governmental problems that have such wide incidence, it is desirable to develop some kind of uniformity of practice. If the appeals go to 10 circuits, there will at least be only 10 different rules on any one subject, assuming that they never get to the Supreme Court; whereas, if they were carried to the numerous district courts, there would be a tendency to diversify that would be much stronger. I am trying to think of the reasons in favor of an appeal to the circuit court of appeals. I suppose the matter of expense is involved; two trials are cheaper than three.

Mr. ROGERS. But you could presumably get an appeal from a district court—

Dr. STASON. There may not be.

Mr. ROGERS. Would it be cheaper for the respondents to go direct to the district court rather than to the circuit court, in the first place?

Dr. STASON. I think it boils down to a question of judicial expediency—which is the more effective way of doing it? An objection to it you have already stated, the distance one has to go in order to seek relief.

Mr. ROGERS. Plus the expense.

Dr. STASON. Plus the expense. We have weighed the pros and cons, and we have come out with the circuit court of appeals as the answer in quite a considerable number of statutes. It is not a matter of much—

The CHAIRMAN. How much more time do you require, doctor?

Dr. STASON. Mr. Chairman, I am entirely through. I will be glad to answer any questions.

Mr. RABIN. Doctor, you gave us the language you would suggest if the McCarran-Summers bill were adopted. Let us suppose it were not adopted. Are you satisfied with the language in this bill now, H. R. 2390?

Dr. STASON. If it were not adopted, and if the commission did not effectuate the procedures in some other way, then I think the language as suggested has merit.

Mr. RABIN. Let us assume this bill were passed, and let us assume the high courts did find that the facts were supported by a preponderance of evidence. Then I assume the facts would be conclusive. Now, do you believe under the language, of this bill as drawn, that the courts would have the right to change the sentence, or change the remedy?

Dr. STASON. No.

Mr. RABIN. They wouldn't, under this bill?

Dr. STASON. Oh, under the bill?

Mr. RABIN. Yes.

Dr. STASON. Under the other clause of the bill, namely, the amendment prescribing that the order may be modified as in its judgment

the circumstances of the case require, I think the court might construe that to permit a change of remedy. If I were doing it, though, I would say so in so many words.

MR. RABIN. I understand that, but I wanted your understanding of the bill as now presented. Let us assume that the courts should find the facts to be supported by a fair preponderance of evidence, and therefore the facts became conclusive. Do you believe, under the phraseology of this bill the court would then have the right to change the remedy? Let me put a preliminary question: Do you believe the court should have the right to change the remedy?

DR. STASON. Yes; I believe the court should have the right to change the remedy if it finds it too harsh.

MR. RABIN. Even under the terms of this bill?

DR. STASON. Yes.

MR. RABIN. Now, do you believe this bill gives it that right?

DR. STASON. As now worded?

MR. RABIN. As now worded.

DR. STASON. It may be so construed, and probably would be.

MR. RABIN. It is open to construction, and you prefer it be written in exact language?

DR. STASON. That is right; it is open to construction and I think there is a chance it might go the other way.

THE CHAIRMAN. Thank you, Dr. Stason. Mr. Digges, how much time do you require?

MR. DIGGES. Not more than 15 minutes.

THE CHAIRMAN. We are somewhat behind on our schedule. We are trying to let those from out of town get away.

STATEMENT OF ISAAC W. DIGGES, REPRESENTING THE ASSOCIATION OF NATIONAL ADVERTISERS

MR. DIGGES. My name, Mr. Chairman, is Isaac W. Digges; I am an attorney at law, of Bedford, N. Y. I appear here as counsel for the Association of National Advertisers. I am not quite so disinterested as the witness who just preceded me. That organization is an organization composed of some 400 manufacturing companies, some large, some small, and some medium-sized, who use the vehicle of national advertising in the marketing of their goods, wares and merchandise.

The Reece bill has been fully discussed, and I believe clearly understood by the board of directors of that organization, and it is pursuant to their instruction that I appear here to testify with regard to one portion of it.

It happens also that I have, over a period of the past 20 years, appeared in cases from time to time, as attorney for respondents, in Federal Trade Commission proceedings. However, in what I expect to say, I hope not to refer directly or by conclusion to any case in which I have had a personal interest, nor do I appear here as a special pleader for the food, drug, or cosmetic industries.

The association which I represent has never appeared in a commission proceeding, either for it or against it; it has never been made the subject of a Commission complaint.

That organization is interested primarily in two things; first, the degree of proof which is required to sustain a cease-and-desist order of the Federal Trade Commission, and, second, that a defendant be tried only once for the same offense.

We do not have any views which are worthy of presentation here as to where jurisdiction should vest with regard to the labeling or advertising or marking of foods, drugs, and cosmetics. Our only concern is an avoidance of duplication. We assume that you will receive lots of evidence on those particular questions from those who are more directly interested, both from the Government and from the interested industries.

Mr. Chairman, I would like to talk about this thing from the viewpoint of a trial attorney who has had some practical experience, rather than theoretical experience, in working under the present system. Our main criticism of the present situation is that the rule of proof which provides that the Commission's findings must be final if there is any substantial evidence to support them, places an unreasonable burden upon the trial attorney for a respondent, and, consequently, upon his client who must pay the bill.

It is our mature judgment that the rule of proof in Federal Trade Commission cases should be exactly the same as that which prevails in every civil court in the United States, that is, judgment upon a fair preponderance of the evidence.

Now, as a practical matter, a conscientious attorney whose client has been cited before the Federal Trade Commission, must make such an exhaustive study of his case prior to the trial that he is prepared to break every Government witness on cross-examination. Otherwise, he must assume that he will lose his case. And in this connection, he may even have, as adversary witnesses, representatives of the executive branch of the Government itself.

I am bound to reach that conclusion because the courts have stated time and again that any substantial evidence will support the Commission's findings, and the Commission itself considers that it has the authority to pick and choose as between witnesses and as between experts, a right which the Supreme Court of the United States in the *Herzfeld* case has specifically denied the courts reviewing the case.

Mr. O'HARA. Mr. Digges, will you permit a question?

Mr. DIGGES. Yes, sir.

Mr. O'HARA. In other words, the Commission has the right to take out small bits of testimony which are disputed by other reliable witnesses and base its findings upon that small bit of evidence, and that is final, so far as the litigant is concerned; is that correct?

Mr. DIGGES. That is correct, sir, and many cases have stated the concept in just those words, or approximately those words. By way of illustration, I might also say that this is the Commission's view of its own functions. In a recent case, Commissioner Freer, in discussing an appeal from the Commission's order, had this to say:

In that appeal, however, the door will be closed to any weighing of the evidence by the court, since the finding of the Commission as to the facts, if supported by evidence, shall be conclusive.

That means to me that the court looks at the record for one purpose only, and that is to see whether or not there is substantial evidence, acceptable evidence of any kind to support any finding of the Com-

mission, and once having segregated that evidence it has no authority to look at the record any further, and I think the courts have said that in their decisions.

Commissioner Freer is exactly right in what he says. That is the law as it has been interpreted by the Supreme Court of the United States. But that construction of the law results in placing the findings of fact by the Commission in a category higher than findings of fact by a district court of the United States.

Another difficulty which a trial attorney has in his cases before the Commission is that he finds little of value to guide him in prior decisions by that body. As is generally known, the Commission really very rarely renders an opinion to accompany its decisions. It usually hands down findings of fact and an injunctive order without accompanying conclusions of law. Nor does the Commission consider that it is bound by its prior decision on similar facts. I was reading the other day from a brief submitted by chief counsel for the Commission in a case pending—now decided—in the Second Circuit Court of Appeals. The attorney for the defendant had contended that the Commission's order would be in consistent with a prior decision by the Commission, and in its brief the Commission replied:

A short and sufficient answer to this contention is that the Commission is no more a prisoner of the doctrine of stare decisis than are the courts. Consequently, even if the Dodson case were identical with the case at bar the Commission would not be bound to follow it if it deemed the decision erroneous.

That is pretty phraseology. It almost sounds as though it might be good law. However, I quoted that statement not for the purpose of entering into a debate on dialectics, or debate the question with my good friend, Mr. Kelly, who is here, of what stare decisis really means, but for the purpose of illustrating the additional burden that is placed on the trial attorney before the Commission.

Mr. O'HARA. Was that statement made before or after one of the Supreme Court Justices had something to say on that same subject?

Mr. DIGGES. Well, Mr. O'Hara, we could get into a very lengthy discussion here on stare decisis, and time is very much of the essence. If you will pardon me, I would rather stick a little more closely to my knitting at this stage. This statement was made in the year 1945, about the month of April.

My friends at the Commission—and I have a great many there—insist that lawyers who take the view that I have stated here, are taking on an unnecessary burden, because they say the Commission only decides cases on the preponderance of the evidence anyway. Well, my own view is that these gentlemen have confused substantial evidence with the preponderance of proof. They are entirely different things. Obviously, there must be some substantial evidence, or the Commission's order will fall. But if there is any substantial evidence the court is without discretion in looking to the weight of the evidence. Now, there may very well be some shreds of substantial evidence from which the Commission may weave an order; there may be some shreds of evidence on every point at issue before the Commission, but that is a very different thing from making an order of the Commission stand up by a fair preponderance of the evidence based on the entire record. In any event, I see no reason, no justifiable reason, why the rule of proof which the Commissioners say they enforce

anyway should not be written into the statute if that, in fact, is the rule of proof which they enforce. But as you gentlemen well know, an attorney for a private party has no right to assume that in his particular case before the Commission it is going to decide on the preponderance of the evidence when the courts have said it is not necessary, when the quotation from the Commission I have just given you shows they know it is not necessary, and when members of the Commission are changing from time to time, and they may change their rules from time to time as the Commissioners change. Or they may change their rules if the Commissioners do not change.

Mr. O'HARA. Your contention is that every case is a new horse race?

Mr. DIGGES. That is right, and no doctrine of stare decisis is ever going to bind them.

Mr. O'HARA. It is refreshing. You never know where you are at any time.

Mr. DIGGES. It is a little difficult, of course, for a trial lawyer who is given the responsibility of protecting his client's interest, to be put in that situation where you don't dare give him any judgment on his course of conduct.

Mr. O'HARA. You are a practicing attorney. Might I ask you, if you please, how do you ever advise any client on any proposition of law, after the pronouncement you just read, and also directing your attention to what one of our Supreme Court Justices said. I am curious about that.

Mr. DIGGES. Well, sir, I think the only way a conscientious lawyer can advise his client today—although this is apart from what we are talking about—is to look at the statute, look at the decisions, read into the statute and read into the decisions, reasonable and unreasonable, and then if there is any segment of freedom left for his client, to tell him to take that course.

Mr. O'HARA. And then tell him the story about "the uncertainty of the law."

Mr. DIGGES. There is another point which the Commission raises in their statement, and I think it is a point of substance and deserves some scrutiny. They say, "Well, now gentlemen, if you are going to limit our powers with regard to passing on facts, you ought to limit the powers of the other administrative agencies," and they cite in their brief the Interstate Commerce Commission, the Securities and Exchange Commission, the National Labor Relations Board, and so forth.

Mr. O'HARA. They are all very sensitive on that point, I understand.

Mr. DIGGES. My answer to that, as a private lawyer, is this: If I go before the Commission charged with an act of unfair competition and say to the Commission, "Well, now, gentlemen, I don't think I should be enjoined here because my competitors are doing the same thing," I don't think I'd get to first base. And they would be right about it, because two wrongs have never yet made a right.

But I would like to go a little deeper into that observation, and that requires that we look squarely at what this thing is called administrative process.

There are two kinds of actions which are taken by administrative agencies. There are those which are quasi-legislative in nature, sometimes called the rule-making function, and then there are those which are quasi judicial in nature. And I think we should all keep clearly in mind that whenever the Federal Trade Commission acts pursuant to a specific complaint, it is always acting in a quasi judicial capacity, because its acts are affecting the conduct of a particular person. Sometimes they put companies out of business, sometimes they destroy their trade-mark, or cause them to divest themselves of corporate assets. That function is, and I pray God always will be, a judicial function.

Now, it has always been true, and I hope always will be true, that the judicial acts or quasi-judicial acts of administrative agencies are appealable, just as the decisions of our inferior courts are appealable. So far, so good. But the real essence of this question is, What kind of an appeal? And that again, I think, in this particular situation, comes down to the more specific question, Is the Federal Trade Commission so expert in its domain that its findings of fact should be given greater weight than those of the Federal district courts of the United States? I think not.

The Commission, of course, has experts on its staff, and expert witnesses are adduced before the Commission in litigated matters. But let us make it clear that every member of the Federal Trade Commission is himself a layman with regard to the technical questions which come before him.

Mr. ROGERS. Let me ask you a question right there. Is it true that the members of the Commission delegate their functions with regard to the preparation of decisions to assistants?

Mr. DIGGES. Well, sir, there are members of the commission here. I can only state to you what my understanding is in that regard. I understand that each Commissioner has a legal assistant who is assigned to him, who reads the records, examines briefs, attends the arguments, but so far as I know does not attend the trials. What those legal assistants do with regard to preparing decisions, I don't know.

Now, the members of this Commission are lawyers—at least, the present members of the Commission are lawyers; they are not bacteriologists, doctors, chemists, or nutritionists. They are triers of the facts, just as our Federal district courts are triers of the facts. They are like a jury in some respects. But in one very important respect they are quite unlike a jury, and that is, in the case of a jury the jury sees, appraises, evaluates the witnesses themselves. Now, the Federal Trade Commissioners never see a witness. They pass upon the record, just as an appellate court passes upon the record.

What transpires is that there are hearings before a trial examiner of the Commission, who summarizes the evidence that is taken but who has no power to determine questions of weight, of credibility. All that he does is to pass on a summary of the evidence that has been adduced before the Commission.

Mr. O'HARA. It seems almost ironical, does it not?

Mr. DIGGES. Well, this is the nature of the administrative process which I think we are here to talk about today.

Now, I ask this question: Can it be said that in those circumstances, where there is no opportunity for a member of the Commission, who have the responsibility of passing on these questions, to see the wit-

nesses, to view them, whether their views should have greater weight than the findings of the Federal district courts of the United States? I think not. I cannot bring myself to believe that there is any special attribute held by the members of the Federal Trade Commission, with a 7-year tenure of office, which is not held by the members of our Federal judiciary, who are appointed for life, subject to good behaviour. I cannot bring myself to believe that the members of the Federal Trade Commission are greater experts on the law of unfair competition than a Learned Hand or a Parker or a Huddleston or a Knox.

Mr. O'HARA. Will you let me ask a question there?

Mr. DIGGES. Yes, sir.

Mr. O'HARA. Let me call your attention to the fact that patent cases may be tried before the district courts. Most of the Federal judges are certainly not experts on patent laws or on the mechanics of the different patents involved. But that seems to have worked out rather satisfactorily, has it not?

Mr. DIGGES. I think so. And you have the same sort of questions with regard to the three industries most particularly concerned here, where the appellate courts are passing on the identical questions coming up through the Food and Drug Administration as they pass on coming up from the Federal Trade Commission. But, curiously enough, with regard to the Food and Drug Administration, they have got a greater power of review than they have here.

I hope, gentlemen, that I have contributed something to this hearing by presenting a point of view which I honestly believe is imperfectly understood at the Federal Trade Commission. The appropriations of Congress pay the expenses of this Commission in the preparation of its cases. There are no similar subsidies for a private party before the Commission. In more cases than not is the small businessman unable to afford expensive lawyers, and any relief which would result in giving that man the same standing and the same dignity before the Federal Trade Commission that he is entitled to as a matter of law in the Federal district courts of the United States, would, in my view and in the view of my client, be decidedly in the public interest.

I don't know whether you gentlemen have any questions; that is all I have.

Mr. REECE. In the trial of cases before the Commission, are the employees of other Federal agencies equally available to the Commission and the defendant?

Mr. DIGGES. Mr. Reece, I have had only one experience in that regard. It was several years ago. We desired, in behalf of the respondent, to have the testimony of a representative of the Bureau of Standards. We thought it was important to our case. He replied to us that he could not testify for the respondent without the prior consent of the Federal Trade Commission, that there was an inter-departmental rule of comity in that respect. This was a number of years ago; I think in 1939. Whether such a rule actually exists, or whether it presently exists, I don't know.

Mr. O'HARA. Don't you have any power of subpoena on behalf of your client?

Mr. DIGGES. Well, there is a point that I brought up in connection with the Attorney General's Committee on Administrative Procedure or Practices, in 1938, where I think an inequity exists.

On a subpoena duces tecum, a subpoena to produce documentary evidence, or documents, you must file a request for that with the Commission itself, supported by an affidavit showing the alleged materiality of the documents sought to be examined. Now, the Commission can either grant that or turn it down. But the effect is, gentlemen, to put your adversary on notice in advance of the testimony of what you are going to prove. I think that is a real hardship, particularly since you have no right to get a bill of particulars from the Federal Trade Commission as to the particulars of their case against you.

Now, as regards the other subpoenas, they may be issued either upon request of the trial examiner, or the Secretary of the Commission. In that respect I have never had any experience of a subpoena being unreasonably withheld. But on this question of subpoenas to produce documents, I think the rule is harsh and inequitable.

Mr. O'HARA. Permit me to ask, What did happen to this witness from the Bureau of Standards? Did he appear?

Mr. DIGGES. No, sir. The consent and the permission of the trial counsel was not forthcoming, and I didn't get him.

Mr. REECE. The rule you refer to as to subpoena duces tecum, is applicable to other departments as well as the Federal Trade Commission?

Mr. DIGGES. I assume so; yes, sir.

Mr. O'HARA. Mr. Digges, in your practice in appellate matters, I assume the appellate court, or the circuit court, from time to time, have stated that if it was the trier of facts it would have found the facts differently in stated cases, but under the rule established it would not disturb if there was any evidence to support, and affirmed the decision.

Mr. DIGGES. That has been the language of the court, sir, in some cases. It doesn't happen to have been my own personal experience. I want to say this in all fairness to the Commission: I have never had to appeal a Commission decision, so that what has happened on appeal is something of which I do not have any personal knowledge. But there are cases where the courts, although you can see from the language they were resentful of the harshness of the Commission's orders, felt themselves unable to do anything about it.

In the Segal case, to which reference, I think, was made by a prior witness, the Circuit Court of Appeals for the Second Circuit said this in commenting on the obvious bias of one witness for the Commission, and the great body of testimony the other way—it ended up by saying:

Even so, if the Commission wish to rely upon such testimony, we may not intervene whatever may be our own indisposition to accept what he said.

In the Smithsonian Institute case, Judge Swann, of the second circuit, said this:

Until recently this court would have regarded itself as competent to modify an order which imposed a restraint broader than the necessities of the case required. Now the court is forbidden to disturb that measure of relief which the Commission thinks necessary.

That goes back to the point which Dean Stason was discussing.

Only because I feel constrained to follow the Herzfeld decision, regardless of my personal views—

says Judge Swann—

am I willing to concur in affirming paragraph 5 of the order.

Judge Buffington in the third circuit, in the Curtis Publishing Co. case, asked this question :

What supervisory power did Congress intend should be exercised by the courts of appeals? For if such supervisory power which is one of substance and judicial in its nature is not to be exercised by that court, then it is manifest that the supervising power which Congress invoked was one of mere shadow and not of substance.

That sounds like they are not very happy about it, from my point of view, and I think, gentlemen, it really comes down to one question upon which opinions may differ. What did Congress intend when it enacted the Federal Trade Commission Act? Did it intend that this fact-finding agency, which was to apply the law of unfair competition as known to the common law, was to have the right of final determination on questions of fact wherever there was any evidence to support them, or did it intend that the rule of substantial evidence meant that the courts had the right to look at the whole record? I don't know. I was not there. I was not even admitted to the bar at the time this matter was before the Congress.

Mr. O'HARA. Mr. Digges, has that rule been preserved in these court decisions on that point?

Mr. DIGGES. I can only say this, Mr. O'Hara, that in my circuit, the second circuit, the courts always assumed that they had that power until the Supreme Court of the United States in *FTC versus Herzfeld* told them they didn't have it, so that the men on that Court who, as Mr. Rabin knows, are men of substance and learning and men who would be well qualified to sit on the Supreme Court of the United States, were confused, and said so. They don't like the present situation, as is evident from their opinions.

Mr. O'HARA. Have you any suggestions for a remedy?

Mr. DIGGES. I haven't reached in my own mind appropriate language, with that degree of particularity advanced here by the first witnesses, but it seems to me that if you get to the root of this question and either decide in this committee here and now what Congress really intended, or what it intends today to do, which one of these concepts is right—was it the intention of the Congress that the whole record should be reviewed, or was it the intention of the Congress, as my friends on the Commission believe, that that function should be specifically taken away from the reviewing courts, and if it is the intention of the Congress that the powers of review should be the same in respect of the Federal Trade Commission as they are in respect of the district courts of the United States, for which I contend, then I think you ought to put in the words "fair preponderance of evidence," or "by a preponderance of the evidence," and you will have language there which every civil court in the United States will understand.

Mr. REECE. If, as you contend, that was the purpose of Congress when the Federal Trade Act was enacted, then these proposed amendments become only clarifying amendments?

Mr. DIGGES. That is correct, sir, and a reaffirmation of what at least the judges of the second Federal circuit, whose views I follow with considerable respect, have to say on that particular subject.

Mr. O'HARA. Mr. Digges, I have a high respect for the purpose for which the Federal Trade Commission was created. It does seem that the trier of the facts, the actual trier of fact—who is called a referee—as I understood—

Mr. DIGGES. Trial examiner.

Mr. O'HARA. The trial examiner, who observes the witnesses, should certainly have some responsibility for making a recommendation as to the facts. He is the one who sees the witness, and the only one, as I understand, in these proceedings, who does. Should he not have some authority to make findings?

Mr. DIGGES. Well, sir, I think you have raised a question that, while I have not been privy to any discussion with the Federal Trade Commission on this particular point, I should say the question whether those Commissioners have the power to delegate their functions of deciding these questions to paid employees of the Commission. I don't know. I think there is a nice question of law there. I think it is a nice question of law, for example, with regard to the very incisive question which was put by one of the committeemen here as to whether or not those Commissioners are now delegating their authority to legal assistants, upon which I profess no knowledge—I am merely stating what I am informed to be the fact.

But I think, Mr. O'Hara, that your question is probably more properly related to what is known as the American Bar Association bill—at least that is what we call it outside the Congress, I understand it is called S. 7 around here—there, if the prosecuting functions are differentiated from the judicial functions, then I think very well that a larger degree of authority should be given to these men. Their findings, or their report upon the evidence is not even part of the record under the present rules of the Federal Trade Commission. In that regard, may I just add this word: I don't think that the comparison which the Federal Trade Commission has made with the Interstate Commerce Commission is a very felicitous one. While I never practiced before the Interstate Commerce Commission, I have been informed that when that agency sits in a determination of a case, it sits as an independent court without any predetermination as to who is right or who is wrong. I mean, there are private parties involved in connection with those cases.

The difference with regard to the Federal Trade Commission—and these gentlemen did not create the statute; it is a criticism which really should be directed to Congress—is that the very act itself requires a predetermination before a complaint may issue. It says, "Whenever the Commission shall have reason to believe that a proceeding by it shall be in the public interest," then it shall issue its complaint. So the act itself requires these gentlemen, at least on a *prima facie* basis, to have some conclusion with regard to the merits or demerits of the controversy. That is very different from the Interstate Commerce Commission.

Mr. O'HARA. Mr. Digges, you touch upon something which has given me a lot of concern—the present acts of Congress directed to this and other branches of the Government in that very situation, wherein we have a citizen of this country charged with a violation of some Federal law, and where the judge and the jury and the prosecutor and the hangman are practically all the same person, or in the same category, which has always been rather shocking to me. Because, if I am charged with a crime, I go into court and the prosecutor prosecutes me, but I have the confidence that the jury and the judge are neutral. I think this administrative phase of what we sometimes call bureaucracy is a

serious thing unless we have somewhere along the line the right of judicial review on the merits. I am very much concerned about that and its effect upon the country and its future. Certainly in some instances, even the liberty of our citizens is involved; certainly very serious property rights are involved in that situation.

Mr. REECE. And it was because of the conditions and circumstances to which you refer I assume that caused the Second Circuit, again in the John Bene case, to say that the Federal Trade Commission, like many other modern administrative legal experiments, is called upon continuously to act as complainant, judge, and counsel.

Mr. DIGGES. May I be philosophical for just a moment in answer to Mr. O'Hara's question? I think there are among citizens of this country, and particularly among businessmen of this country, two trends which are of great danger to what has often been referred to as the American way of living, and by other, and erroneously so, as the system of free enterprise, because we have never had any system of free enterprise in this country, and never will have. What we have had is a system of private competitive enterprise under law, which is a very different thing. However, a great deal of power is achieved by administrative agencies—and I am not talking about the Federal Trade Commission now, but administrative agencies generally.

Mr. O'HARA. Let me change my question and make it general.

Mr. DIGGES. Yes, because of the fact that men fritter away their liberties because it is inconvenient to fight for them; it is not worth the time involved to come down and fight for your liberties. That is one thing. And, of course, every time a man fails to fight for his liberties, the power of bureaucracy has grown in that respect. Secondly, and this has some specific application to this hearing going on here today, is the feeling among businessmen that Government touches them at so many points and in so many ways that they do not dare to come down here and tell you what they really feel. I have had clients of my own who raised serious question as to whether I should appear here, for fear of possible repercussions against them by the Federal Trade Commission. I know that is a lot of nonsense. I can't conceive of men of integrity that head the Federal Trade Commission doing any such thing, but there is that feeling. And those two things, in my field of observation, are things which are very dangerous.

Now, Mr. Chairman, I am acting as messenger in this regard. I have been asked to file with the committee a brief in behalf of the Motor & Equipment Manufacturers Association, which is an organization made up of a lot of small manufacturers, and some large ones, in which they have addressed themselves specifically to the statement made to this committee by the Federal Trade Commission. It is not my brief, and I do not want the record to indicate it is my brief. I am merely handing it in for the record.

Mr. RABIN. It will be received.

(The brief referred to will be found at the end of the days proceedings.)

Mr. REECE. There has been sent to me a brief which was prepared by Chadbourne, Wallace, Parke & Whiteside in support of this bill, and there will be others, which I would like to have appear in the record.

There is also a letter from Carl M. Anderson, chairman of the legislative committee of the drug, chemical, and allied trades section, Board of Trade, New York City; a resolution by the Chamber of Commerce of the State of New York; and a brief by G. V. Thompson, vice president and secretary of the Cream of Wheat Corp., Minneapolis, Minn. Also a brief by Mr. John Mueller, legislative committee cochairman, of the Associated Drug & Chemical Industries of Missouri and, as I have said, there will be others.

These briefs will appear at the end of the day's proceedings, and I would like the briefs thus submitted to appear in the same type as though presented in person.

(The papers referred to are as follows:)

STATEMENT OF THE MOTOR AND EQUIPMENT MANUFACTURERS ASSOCIATION
IN SUPPORT OF H. R. 2390

I

The Motor and Equipment Manufacturers Association respectfully submits for consideration of the Committee on Interstate and Foreign Commerce the following brief advocating passage of H. R. 2390, a bill to amend the act creating the Federal Trade Commission, to define its powers and duties, and for other purposes.

The Motor and Equipment Manufacturers Association is a trade association incorporated under the laws of the State of Illinois. Its object is "to foster the commercial interests of its members in the manufacture, sale, service, and use of fabricated and raw materials, component parts, machinery, tools, and devices of all kinds in the automotive, aircraft, marine, and related industries, and to encourage friendly intercourse among its members for their welfare and the advancement of their trade interests."

The association, known throughout the industry as MEMA, has been functioning since 1904 as the organized voice of leading manufacturers of parts, accessories, shop equipment, service tools, and maintenance materials in the automotive and allied fields. MEMA membership is comprised of manufacturers and is available to any company of good repute actually engaged in the production or manufacture of any of the above-listed automotive or allied products.

Under the present wording of the Federal Trade Commission Act, "the findings of the Commission [upon appeal] as to the facts, if supported by evidence, shall be conclusive."

The Reece bill would amend this provision so that the Commission's findings would be conclusive "if supported by the preponderance of the evidence."

It is important that there be a clear and accurate understanding of the effects that such an amendment will have.

As the Commission correctly points out in its published statement with regard to this bill, the courts have held that the word "evidence," now required in order to render the Commission's findings conclusive, must be deemed to be qualified by the word "substantial." However, "substantial" is a word of art, and, as applied by the courts to the cases before them, does not have the breadth of scope implied in its ordinary usage, or as implied by the Commission in its statement.

What the courts mean when they say that there must be "substantial" evidence to support the Commission's findings is merely that the record must contain some evidence of a more substantial nature than mere rumor, guesswork, conjecture, or ambiguity. The latter obviously are not enough to render a finding conclusive.

However, if the appellate court, upon searching the record, is able to find any evidence at all contained in it which amounts to more than the insubstantial character above indicated, then it is bound by the Commission's findings of fact, based upon such evidence, regardless of what other evidence there may be in the record to controvert it (*FTC v. Beechnut Co.*, 257 U. S. 441 (1922); *Harriet Hubbard Ayer, Inc., v. FTC*, 15 F. (2d) 274 (C. C. A. 2d, 1926), certiorari denied, 273 U. S. 759).

In other words, in determining whether or not there is evidence such as to render the Commission's finding conclusive, the court is restricted to determining whether any such evidence appears in the record, and, once having found it, the court cannot take into consideration its relationship to other evidence, regardless of how persuasive or how plentiful the controverting proof may be.

For example, let us assume a case in which a single eyewitness has testified, from bare memory, as to the occurrence of a certain event. Inasmuch as his testimony is not vague rumor or speculation, it constitutes substantial evidence within the meaning of the rule under discussion. Since it does so qualify, findings of fact based upon that kind of testimony are binding upon the circuit court of appeals in spite of the fact that the record might contain contradictory testimony of numerous unimpeachable witnesses supported by objective evidence in the nature of photographs or other credible evidence. The appellate court is precluded from taking into account the contradictory testimony and evidence, as that would constitute a weighing of the evidence, which it may not do, in view of the statutory provision that the Commission's finding is conclusive because there is "substantial" evidence to support it, that is, the competent, relevant, material, and otherwise admissible testimony of the single witness referred to above. If the testimony of the single witness has been based upon mere rumor, the circuit court of appeals could have disregarded it is not being "substantial," but as it was not, it must be accepted by that court as sufficient to support the Commission's findings, even though the court itself would disagree with the Commission's findings. That is the sole extent of the rule announced by the court that the evidence to support a Commission's finding must be "substantial."

The Reece bill seeks to vest in the circuit courts of appeal the authority to consider the evidence in support of the Commission's finding of fact in its relationship to the other evidence introduced during the course of the proceeding; in other words, to allow it to weigh the evidence to the extent, at least, of determining whether or not the Commission's finding was supported by a preponderance of the evidence.

II

Fair play demands that the defendant in a judicial or quasi-judicial proceeding, have his rights determined upon the fair preponderance of the evidence. There is no tolerance within the American concept of justice for imposition of penalties or deprivation of rights when the weight of the evidence discloses that the respondent has conducted himself with propriety.

If the Federal Trade Commission should be required to determine proceedings before it upon the fair preponderance of the evidence, ability of the appellate courts to affirm the Commission's findings after an unrestricted examination into the matter would foster confidence in and enhance the prestige of the Commission. If, on the other hand, the outcome of the Federal Trade Commission proceedings is to continue to be controlled by factors other than the fair preponderance of evidence, it would represent a deplorable condition of moral bankruptcy and judicial impotency that would turn away the victim without a remedy.

Thus far, we have considered the public interest only insofar as it concerns respondents in Federal Trade Commission proceedings, for it is upon those respondents that the impact of injustice most directly falls. No legislative inquiry into the desirability of the Reece bill would be complete, however, without a consideration of its salutary benefits to the consuming public.

If any single thing were to be designated as most distinctive of the American competitive economy, it would be the care with which merchandise is developed, manufactured, packaged, and distributed to suit every need, desire, and whim of the consumer. It is to the consumer's advantage that he may be informed as to the extent of the benefits to be derived from the various articles of merchandise available in the market. In the case of new and improved products and processes, this is more than desirable, as it becomes a matter of public concern.

Yet, under the Federal Trade Commission Act as now written, the Commissioners are empowered to withhold such desirable advice and information from the American public notwithstanding that the fair preponderance of evidence may reveal the obvious welfare of the public in learning of such new and improved products and processes.

III

The Commission's argument against those provisions of the Reece bill which would enlarge judicial review are divided into two headings: (1) the increased judicial authority is unnecessary; and (2) it is inadvisable.

The mere fact that the Commission opposes a requirement that its orders be based upon a preponderance of the evidence, necessarily implies a desire upon its part to retain its present power to decide the rights of respondents in a manner that runs counter to the weight of the evidence. So self-condemnatory is this position that further refutation would be superfluous. Any governmental commission which, vested with the responsibility of determining important and valuable public and private rights, desires freedom to do so regardless of a preponderance of the evidence, needs by very virtue of such a philosophy to be the subject of effective judicial review.

Aside from the foregoing, however, the sole argument advanced by the Commission to demonstrate that judicial authority to test its decisions by the standard of the preponderance of evidence is unnecessary, becomes patently unsound upon analysis.

In this connection, the Commission urges that under the present law, the appellate courts possess power to vacate any findings which are not supported by substantial evidence. So far so good, and in this statement the Commission is correct. However, it goes further to say that this is equivalent to the appellate authority of the courts as to regular jury cases or trial-court determinations in the Federal district courts, and that to confer upon the circuits courts power to overrule findings by the Commission which are not supported by a preponderance of the evidence would be to give such courts power beyond those ordinarily possessed by them in the regular judicial process.

Anyone who has been present at a jury trial knows that a regular and major portion of the judge's charge to the jury is devoted to instructions that it must decide the case before it upon the fair preponderance of the evidence. This is a legal requirement. Any jury verdict which does not conform to it may be set aside either by the trial court itself or by a circuit court upon appeal.

The Commission has found and quoted some language to the effect that appellate review as to the acceptance of substantial evidence to support a finding is equivalent to the scope of review of motions for directed verdicts. But the Commission overlooks the important fact that there is in the regular civil trial a further motion to set aside a jury's verdict as being contrary to the weight of the evidence which is different from and additional to the motion to direct a verdict (*Adams v. United States*, 116 F. (2d) 199 (C. C. A. 7, 1940)).

As to district court trials by a judge without a jury, rule 52b of the Federal Rules of Civil Procedure provides: "* * * when findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised. * * *"

Certainly, the present powers of the circuit courts to review findings by the Commission on the sole basis of whether or not there is any substantial evidence in the record to support them falls far short of their power to pass upon motions to set aside the verdict of a jury as being contrary to the weight of the evidence, or to determine the "sufficiency of the evidence to support the findings" of district court trial judges.

Even if the Commission's arguments in this regard were sound, it would nevertheless not justify the conclusion sought to be drawn by the Commission. There are many other factors which distinguish a proceeding before the Commission from a regular civil trial, and the differences are such as to require more extensive powers of review upon appeal in Commission cases than are necessary to the administration of justice in civil trials.

In the first place, proceedings before the Commission are not governed by ordinary rules of evidence (*Phelps Dodge Refining Corporation v. FTC.*, — F. (2d) — (C. C. A. 1943); *John Bene & Sons, Inc. v. FTC.*, 299 Fed. 468 (C. C. A. 2d, 1924)). The rules which are administered in civil trials have been evolved out of centuries of experience and intensive thought in order to assure that the evidence permitted to be heard by a jury is best adapted to the non-prejudicial determination of the essential facts. Under such circumstances, a finding that substantial evidence has been presented during the course of the case in support of the jury's finding is assurance that evidentiary matter of real weight, competency, and importance has been adduced during the course of the trial.

In a Commission proceeding, however, the respondent has no such safeguard. The protective rules of evidence may be disregarded. Statements or documents may be introduced into evidence to support the finding, which would be inadmissible and hence insufficient to support a decree in a civil case.

Another distinction of vital importance is that a jury is impartial. The Commission, on the other hand, for all of its conscious desire to be honest, objective, and fair, inescapably approaches a determination of proceedings before it midst an aura of prejudgment. This arises out of the fact that the Commission is not only the court but the prosecutor as well, and may even furnish witnesses for the Government from among its own employees and agents. The mere fact that the Commission issues a complaint requires a preliminary determination by it that the respondent has violated its precepts. (Section 5 of the Federal Trade Commission Act authorized issuance of a complaint only "whenever the Commission shall have reason to believe [the respondent] has been or is using any unfair method of competition or deceptive act or practice in commerce.")

Many, if not most, of the Commission's findings of wrongdoing by respondents are based upon the interpretation which it attaches to certain forms of commercial activity and practice, interpretations to which fair-minded strangers might not agree. The very issuance of a complaint in such a case bears testimony to the existence of such a point of view at the Commission, and the same thought processes that led the Commission to issue the complaint motivate the ultimate decision upon the issues raised by the complaint. If this is not predetermination, we do not know what the word means. Commission proceedings are more truly activities of enforcement than of adjudication. In the light of the evils which may arise out of so fertile a source of activity, it becomes apparent that greater protection by way of judicial review is needed than in civil trials, where the predisposing factors to injustice do not exist.

That this is a real and not an imaginary evil artificially conjured up for purposes of scholastic debate is strikingly illustrated by the case of *Marquette Cement Manufacturing Company v. Federal Trade Commission*, (C. C. A. Seventh, 1945). In that case, the respondent before the Commission sought to have the Commission disqualify itself from conducting the proceeding on the grounds of bias and prejudgment. It attempted to introduce before the Commission 23 documentary exhibits covering a period from 1927 to 1941, and showing that, prior to the respondent's hearing, the Commission had already arrived at a determination as to what the outcome should be.

The Commission would not even permit the exhibits to be introduced into evidence. However, the exhibits did come before the circuit court of appeals in the course of a proceeding by the respondent to have the Commission's determination review. The Circuit Court of Appeals for the Seventh Circuit was forced to decide that it was powerless to compel the Commission to disqualify itself even though prejudgment might have existed. It based this decision upon the fact that Congress, which created the Commission, did not provide for its disqualification, even though bias might exist. Some of the statements in the opinion of the court are highly illuminating.

"Congress is the creator of all inferior Federal courts, as well as administrative agencies. The jurisdiction and authority of each is confined solely to that which Congress bestows. There are no limitations upon this congressional power other than the Constitution. Congress has conferred upon a litigant the right to challenge the qualification of a judge, provided such litigant complies with the statutory mandate. On the other hand, no such right has been conferred upon a litigant before the Federal Trade Commission. In our view, the right to disqualify a trier of facts created by Congress, whether it be a judge or an administrative agency, is a matter for Congress. Such right may be conferred or withheld as Congress deems advisable."

* * * * *

"In conclusion, we are not unsympathetic to the criticism directed at the Commission by Marquette, a criticism much aimed at all administrative agencies, to the effect that their multiple functions as prosecutor, judge, and jury constitute an abridgment of the cherished right to a fair and impartial hearing. On the other hand, as already pointed out, they are the creatures of Congress and it is not within the province of courts either to emasculate or enlarge the powers which it has conferred. Any appeal for relief should be made to Congress rather than to the courts."

A third distinction is that in civil trials the trier of the fact, whether it be judge or jury, has the all-important opportunity of personally viewing the wit-

nesses. This is the most vital factor in their process of deciding the weight to be given to conflicting testimony, and in passing upon the credibility of the various persons who take the stand. By virtue of this opportunity, the trial judge, or jury, possesses an advantage in passing upon the evidence which is lacking in appellate courts. In Commission proceedings, however, the five commissioners who initially pass upon the facts, stand in no better position with regard to the evidence than does the appellate court which reviews their findings. Both base their determination solely upon the same printed record, and neither of them views the witnesses or the trial itself. Thus, while there may in civil trials be justification for according the appellate courts less power than the trial courts to pass upon the facts, there is no such reason with regard to Commission proceedings.

IV

The Commission's contention that it is inadvisable for appellate courts to be enabled to decide whether or not findings are based upon the preponderance of the evidence may be subdivided into three headings: (1) That the Commission is better prepared, as an expert upon the matters tried before it, to make such a determination; (2), that the courts would fall into the error of substituting quantity of evidence for weight of evidence; (3) that there would be conflicting determinations upon the same set of facts by different circuit courts of appeal.

All of these contentions are without merit.

If the courts are inexpert in matters which come up to them through the Commission, then they must necessarily be labeled inexpert in the matters which they handle in the ordinary day-to-day course of their regular judicial function. We doubt that there is any subject matter the Commission can name which comes before it that doesn't also come to the circuit courts of appeal through its review of district court decisions. Intricate matters of bankruptcy, corporate affairs, real estate matters, unfair competition, economic conditions, and the like, all form the regular grist of the judicial mill. Minds which over the years of a life tenure in office have become sharpened to such matters do not become dulled to those situations when they are presented in appeals from Commission orders. Possibly the most specialized factual circumstances with which the Commission deals are those relating to technical questions, relating to foods, drugs, and cosmetics. Yet, the circuit courts of appeal, apparently oblivious of any mental impediment, review with apparent competency those very same matters in connection with Food and Drug Administration proceedings originating in district court actions. Additionally, under section 13 of the Federal Trade Commission Act, a temporary injunction may be sought by the Commission in a district court, based upon precisely the same matters which are to be litigated before the Commission itself. Is it to be claimed that the same type of judicial mind which is called upon to determine the propriety of issuing such an injunction is not sufficiently expert to judge the facts involved in the course of an appeal?

A similar underestimation of judicial intelligence is implied by the Commission's claim that the appellate courts will confuse quality of evidence with quantity. If the relative expertness of the appellate courts and the Federal Trade Commission to deal with such concepts is to be estimated, the former must be considered to have the advantage by far, for this is exactly the field with which it daily deals in considering, upon appeal, the propriety of factual decisions by trial courts and juries. It is the court of law, rather than the Commission, which has defined the difference between weight of evidence and amount of evidence, and to claim that the author of the distinction is less competent to apply it than persons who merely parrot it, is not very persuasive.

Insofar as the Commission's fear of conflicting decisions amongst circuit courts is concerned, all that need be said is that the function of the United States Supreme Court is designed to meet just such a contingency. If the questions of fact are so close that different circuit courts will reach differing conclusions in similar situations, then it is far better to have such a conflict arise and be ultimately determined by the care and consideration involved in a Supreme Court decision, than to leave resolution of such a close question to the Federal Trade Commission alone, without any possibility of further independent review.

By frequent statements in its memorandum, the Commission points out that there are remarkably few appeals taken from its orders. From this it would infer that its findings are so satisfactory that there are few appeals. We draw a very different conclusion. We believe the paucity of appeals is due to knowledge that the jurisdiction of circuit courts of appeal is so circumscribed and

limited under the present provisions of the Federal Trade Commission Act that the expense of appealing is unwarranted, since the appellant cannot succeed, even though the preponderance of evidence is on his side. In all justice this is a situation crying for correction. Of what avail to have the right to go through the form of an appeal, if the court appealed to is powerless to accord justice? The answer is obvious.

It is, therefore, respectfully submitted that H. R. 2390 should be enacted into law.

MOTOR AND EQUIPMENT MANUFACTURERS ASSOCIATION,
By ALBERT H. ELCHHOLZ, *General Manager*.

Dated January 23, 1946.

BRIEF OF CHADBOURNE, WALLACE, PARKE & WHITESIDE IN SUPPORT OF THE BILL

This memorandum is submitted by Chadbourne, Wallace, Parke & Whiteside, a law firm of 25 Broadway, New York City, as the result of an invitation to do so extended by the Honorable L. Carroll Reece to one of its clients.

In submitting this memorandum in support of the proposed amendment we do so in the belief, gained as a result of our own experience as well as our study of the reported decisions, that this legislation is in the public interest. We have represented, or presently represent, various clients in a number of Federal Trade Commission matters. We do not, however, refer herein to any proceedings now pending which involve any of our clients.

THE PROPOSED AMENDMENT OF SECTION 5 (C), PERMITTING THE REVIEWING COURT TO APPRAISE THE EVIDENCE UPON WHICH THE COMMISSION BASES ITS ORDER, AND TO REVIEW THE REMEDY PRESCRIBED

As Congressman Reece has pointed out, the Federal Trade Commission acts simultaneously as complainant, jury, judge, and prosecutor. Acting upon its own initiative, or upon a complaint received from "any person, partnership, corporation, or association" (including, of course, any competitor of the respondent), the Commission prepares and serves its complaint. After the respondent has answered, his case is tried before a trial examiner, who is a representative of the Commission, and the role of prosecuting attorney is taken by one of the Commission's attorneys. At the conclusion of the trial, the trial examiner makes his report upon the facts, conclusions of fact, conclusions of law, and recommendation for appropriate action by the Commission. After giving the respondent an opportunity to file exceptions to the trial examiner's report and submit a brief, the Commission makes its findings of fact and issues its order.

In addition to this combination of the prosecuting and judicial capacity in one closely knit organization, the Federal Trade Commission Act presently provides that, upon a court review of the Commission's order, the Commission's findings as to the facts shall be conclusive if supported by evidence. No matter how clear and convincing the evidence to the contrary may be, the Commission can support its position and make findings of fact in accordance with its complaint which are entirely unassailable, provided it can point to any substantial evidence in the record in support of the facts as it claims them to be. And having determined the facts, the Commission can proceed to issue an order which, under recent decisions of the courts, cannot be modified by any court on review, no matter how far it goes beyond the actual needs of the situation. This recent development is in itself so serious as to require the proposed amendment of the act, as will appear from consideration of several court decisions before and after the promulgation of the present doctrine.

It has been recognized for many years that, under the act as it now reads, a court cannot disturb the Commission's findings if supported by evidence. For instance, the testimony of generally qualified experts who have had no personal experience with the product in question constitutes "substantial evidence" which will support the Commission's finding, so as to preclude the reviewing court from considering the weight of conflicting testimony of other experts who have had actual experience with the product (*Neff v. Federal Trade Commission*, 117 F. (2d) 495). For a time, however, the reviewing courts, particularly the second and third circuits, endeavored to apply a measure of reasonableness to the ultimate result, by modifying the remedy or by finding that the evidence was not "substantial."

For instance, in *Allen B. Wrisley v. Federal Trade Commission* (113 F. (2d) 437), the court stated (p. 440):

"One of the brands named in the complaint and the findings is, 'Palm and Olive Oil Soap.' Was the use of such brand and label a representation that it was a 100-percent olive-oil soap, and does the evidence substantially support a finding to that effect? There was testimony by a number of witnesses, including some of the witnesses for the Commission, who testified it would mean to them a soap, the contents of which included, at least, both palm oil and olive oil. The only evidence to the contrary, upon which the Commission is forced to rely, is found in a stipulation between counsel for the respective parties entered into during the course of the hearing. It was stipulated and agreed that if 30 members of the consuming public were called to testify, they would give certain testimony regarding various matters in controversy. Included in such matters was that '16 of said 30 persons would testify that they understand olive-oil soap to be one, the oil content of which is 100 percent olive oil,' while 14 would testify to the contrary, and 24 of said 30 persons would testify that use of the expression 'palm and olive oil soap' would lead them to believe that said soap is an olive-oil soap, i. e., one containing 100-percent olive oil. In our judgment, such a stipulation can be given little, if any, weight, and cannot be said to be substantial in view of the unanimous testimony to the contrary given by witnesses who appeared personally. How a person with any intelligence could look at the label or brand upon a cake of soap or the wrapper thereof, containing the two descriptive words 'palm and olive' oil and be mislead into believing that such words meant 100-percent olive oil, is so incredible as to be unbelievable. We suppose that by the same process of mental reaction, such witness would believe that the words 'goose grease and lard' means 100-percent lard and no goose grease, or that if shown a picture of a cow and a horse, would be led to believe he had seen a picture of two horses."

As to other brands involved in the Wrisley case, the court found that the order went far beyond the scope of the proceeding, requiring the naming of each ingredient in the brand name (p. 442):

"Various oils and fats are used in the manufacture of soap, such as olive, palm, tallow, white grease, olive oil foots, etc. Where the soap contains a number of oils, the order, as we understand it, would require that the name of each be included in the brand or label name. This would seem highly impractical, which perhaps is immaterial, but the essential objection is that such a requirement is beyond the involved issue. The sole issue, as stated heretofore, was that the representation of a 100-percent olive-oil soap was an unfair method of competition. If it failed to meet that requirement, it was immaterial and beside the issue as to what other ingredient it might include. It was that representation which deceived the public. The purpose of the order is to prevent such deception. In order to accomplish such purpose, the public, who has been deceived, needs be informed only that petitioners' soap is less than 100-percent olive oil. With that information, the public who demands a 100-percent olive-oil soap will no longer be interested in petitioners' product, or its contents."

In *Gimbel Brothers v. Federal Trade Commission* (116 F. (2d) 578), having found that mixtures of wool and other fibers had been represented as "woolens" (without any finding that the petitioner knew, or was negligent in not knowing, that the goods were not all wool), the Commission ordered that when fabrics composed partly of wool were offered for sale, the petitioner could thereafter use the words "wool" and "woolen" (in referring to them as "Mixtures of Wool and Rayon," for example) only if the percentage of each constituent material was stated. The court modified the Commission's order, stating (p. 579):

"We are satisfied that the Commission's order was correct, except for its burdensome proviso. This required, in the case of fabrics composed only partly of wool, words describing each constituent fiber in the order of its predominance by weight; and if any particular fiber was not present in a substantial amount by weight the percentage in which such fiber is present was required to be stated. This goes too far (*Whirsley Co. v. Federal Trade Commission*, 113 F. (2d) 437, 442 (C. C. A. 7)). * * * To require each constituent element to be described in the order of its predominance or in percentages would seem to require the retailer to make a laboratory test of each piece of goods put on sale. The petitioner's competitors are not required to describe mixed woolens in any such detail. The Commission expressly found that one competitor 'truthfully represented' similar merchandise as 'Mixtures of wool and rayon.' We think the order should be modified * * *"

In *Etalissements Rigaud, Inc., v. Federal Trade Commission* (125 F. (2d) 590), the Commission had found that perfume bearing a French name and showing a Paris address, as well as a New York address, on the bottle, misled the public, since the perfume was not compounded in France and the manufacturer was "not strictly a French concern," even though some of its officers lived in France and essential oils used in the perfumes were imported from France. In modifying the order the court said (p. 591):

"We think the order is too broad. The proceeding against Rigaud and Fougere was calculated to correct abuses which at best were trifling and but for the broad discretion lodged in the Commission we should regard as hardly worth serious consideration. It must, however, be remembered that the ingredients of the perfumes were mainly French and that the business to a great extent has been supervised by French directors and stockholders. It is notorious that French names are commonly used to describe perfumes and for some reason seem to be favorite with the trade. It is doubtless permissible to forbid the use of words which indicate a French origin and manufacture when strictissimi juris there is none, but we can see no reason for proscribing the use of all French words when designating the perfumes or for the rather fantastic requirement of the order that the price of retention must be an accompanying English translation. It is enough to insist upon the abandonment of the words 'Paris' or 'Paris, France' unless they are limited as in clause 1 of the order."

It is obvious that substantial injustice would have resulted had the reviewing courts not modified the orders in the Wrisley, Gimbel, and Rigaud cases cited above. Since those cases were decided, however, several decisions of the Supreme Court appear to have taken away the power of the circuit courts of appeals to review the remedies prescribed by administrative bodies, with the result that if the above cases were decided today, the circuit courts would be powerless to change the orders of the Commission, unjust as they were. This is apparent from the recent case of *Herzfeld v. Federal Trade Commission* (140 F. (2d) 207, C. C. A. second circuit). In this case the court was considering an order of the Federal Trade Commission which forbade the petitioners to use the word "Mills" as part of their title where it appears that they were importers and wholesalers, but not manufacturers. After finding that the Commission was justified in concluding that retailers were misled by petitioner's title, the court said (pp. 208, 209):

"* * * It does not follow that the relief granted should extend to an entire suppression of the word, 'Mills'; and, if we thought ourselves free to control the remedy, we might be satisfied to modify the order by merely adding some such suffix as the Supreme Court thought adequate in *Federal Trade Commission v. Royal Milling Co.* (288 U. S. 212, 218, 53 Sup. Ct. 335, 77 L. Ed. 706); and as we imposed in *Bear Mill Mfg. Co. v. Federal Trade Commission* (2 Cir., 98 F. 2d 67). Assuming that the distinction taken by the Court of Appeals for the District of Columbia in *Federal Trade Commission v. Army & Navy Trading Co.* (66 App. D. C. 394, 88 F. 2d 776), is valid, it would not apply to the situation here; the petitioners are near enough to being manufacturers to justify their use of the title as it stands, provided all chance of deception were removed.

"However, since *Federal Trade Commission v. Royal Milling Co.*, *supra* (288 U. S. 212, 53 Sup. Ct. 335, 77 L. Ed. 706), was decided, the Supreme Court has as much circumscribed our powers to review the decisions of administrative tribunals in point of remedy, as they have always been circumscribed in the review of facts. Such tribunals possess competence in their special fields which forbids us to disturb the measure of relief which they think necessary. In striking that balance between the conflicting interests involved which the remedy measures, they are for all practical purposes supreme. *International Ass'n of Machinists v. National Labor Relations Board* (311 U. S. 72, 82, 61 Sup. Ct. 83, 85 L. Ed. 50); *Phelps Dodge Corp. v. National Labor Relations Board* (313 U. S. 177, 198-200, 61 Sup. Ct. 845, 85 L. Ed. 1271, 133 A. L. R. 1217); *Virginia Electric & Power Co. v. National Labor Relations Board* (319 U. S. 533, 541-543, 63 Sup. Ct. 1214, 88 L. Ed. 1568); *Williams Motor Co. v. National Labor Relations Board* (8 Cir., 128 F. 2d 960, 965). It is true that all these decisions concerned the Labor Board, but that tribunal does not enjoy a position of peculiar authority, as the court has indicated in other connections. [Citing cases.] In controversies about trade-marks, and particularly about trade-names and make-up, the question is almost always one of degree; i. e., how far the chance of deception outweighs the inconvenience, or worse, to the merchant inevitable in compelling him to change his mark, his name, or his package. The decree marks the compromise which the court thinks adequate and necessary; it is the resultant of those unex-

pressed determinants which collectively we conceal under the term 'discretion.' We do not forget that from time immemorial this duty has been entrusted to courts, but that is irrelevant. Congress having now created an organ endowed with the skill which comes of long experience and penetrating study, its conclusions inevitably supersede those of courts, which are not similarly endowed."

Having in mind the observations of the second circuit court in other Federal Trade Commission matters, the irony in the last sentence quoted above is apparent.

Even before the Supreme Court took away the power of the reviewing courts to exercise discretion with respect to the remedy exacted by the Commission, it had cut off any tendency toward the use of judicial discretion in the review of the Commission's findings of fact in its decision in *Federal Trade Commission v. Standard Education Society* (302 U. S. 112). That case involved sales methods used in marketing an encyclopedia. The Circuit Court of Appeals for the Second Circuit had followed earlier cases and taken what might be termed an adult view of certain of the Commission's findings (86 Fed. (2d) 692, 695):

"Coming now to the practices forbidden, the first and third clauses of the order were in substance the same; they forbade representing that the 10 books were given away and that only the 'extension service' was sold. It is true that the Commission is not to sanction unfair trade practices merely because they are of long standing; its duty is to bring trade into harmony with fair dealing (*Federal Trade Commission v. Winsted Hosiery Co.*, 258 U. S. 483, 493, 494, 42 Sup. Ct. 384, 385, 386, 66 L. Ed. 729). To the discharge of that duty it should not, however, bring a pedantic scrupulosity; too solicitous a censorship is worse than any evils it may correct, and a community which sells for profit must not be ridden on so short a rein that it can only move at a walk. We cannot take seriously the suggestion that a man who is buying a set of books and a 10 years' 'extension service,' will be fatuous enough to be misled by the mere statement that the first are given away, and that he is paying only for the second. Nor can we conceive how he could be damaged were he to suppose that that was true. Such trivial niceties are too impalpable for practical affairs, they are will-o'-the-wisps, which divert attention from substantial evils (*Winston Co. v. Fed. Trade Comm.*, 3 F. (2d) 961 (C. C. A. 3)). It is possible to read *Consolidated Book Publishers v. Fed. Trade Comm.* (53 F. (2d) 942 (C. C. A. 7)), as holding to the contrary, but the case was complicated by a number of graver practices which probably colored the whole. We are not satisfied that stripped of these, the bare practice would have been held bad; if so, we prefer to follow the third circuit."

The circuit court had also taken the liberty to determine that another clause of the order was not supported by evidence, because the only evidence referred to was a witness' conclusion which was outweighed by other evidence. The court stated (p. 697):

"The eighth and ninth clauses were related; they concerned testimonials used as advertisements. For the eighth, which forbade the use of such testimonials which had not been given by the person whose name was used, we have been able to find no support in the evidence; and we are referred to none except the conclusions of one Nixon, which are outweighed by her identification of the handwriting of the person whose name was used."

The decision of the circuit court of appeals was reversed by the Supreme Court as to clauses 1, 3, and 8 of the order (302 U. S. 112, at p. 117). The Supreme Court stated (p. 117):

"The courts do not have a right to ignore the plain mandate of the statute which makes the findings of the Commission conclusive as to the facts if supported by testimony. The courts cannot pick and choose bits of evidence to make findings of fact contrary to the findings of the Commission. The record in this case is filled with evidence of witnesses under oath which support the Commission's findings. Clauses 1 and 3 of the Commission's order should be sustained and enforced.

* * * * *

"The court of appeals reversed the eighth clause of the order of the Commission. The reason given by the court below for this action was as follows:

"For the eighth, which forbade the use of such testimonials which had not been given by the person whose name was used, we have been able to find no support in the evidence; * * *"

"We are convinced that the Commission's findings of fact justified this clause of the order and that the testimony supports these findings."

The effect of the *Standard Education* case is reflected in the opinion of the second circuit court in *Moretrench Corp. v. Federal Trade Commission*

(127 F. (2d) 792), where the court displayed some impatience with the "pedantic scrupulosity" of the Commission, but confessed its impotence to do anything about it. The Moretrench case involved advertising of devices known as well points, which were sold to engineering contractors for use in draining wet places preparatory to building or engineering operations. The following portion of the court's opinion is of interest (p. 794):

"The second question is of the effect of not introducing a second valve to prevent 'backwash.' The second valve does do just that, and the Commission now concedes that the Moretrench Corp. should be allowed to proclaim the advantages of its own construction; for this reason its order only forbids 'disparaging' the Complete or Griffin well points because they do not prevent 'backwash.' Apparently the trade differs as to the value of this feature; particularly in the case of a pointed well point, like the Complete and the Griffin; some people believe it to be an advantage to have some of the 'jetting' water flow back into the draining space and out through the holes in the side of the point. They think that it 'lubricates' the surrounding soil and makes it easier to sink the well point. Moreover, they believe that the 'backwash' helps clear the screen as it sinks, and that it is otherwise likely to become clogged. There was testimony to that effect which the Commission might accept, as it did in preference to the contrary testimony of the Moretrench Corp.'s experts. On the record we doubt whether we should have concluded that the 'disparaging' statements were misleading; but since our office ends as soon as we find substantial support for the finding, this part of the order must also be affirmed.

"The next statement challenged is that one Moretrench well point is as good as any five others and never clogs. This was part of an insignificant advertisement which appeared over 5 years ago and had been discontinued before the complaint was filed. It was put in quotes and followed by the words 'say experienced contractors.' It is not apparent how it is important now to forbid its repetition. Nevertheless, the Commission thought it otherwise, took evidence upon the issue, found that it was untrue—which literally it was—and now presses this part of the order. The only point which can be made against it is that it was put forward as an opinion of others, and not as emanating from the Moretrench Corp. itself. It is extremely hard to believe that any buyers of such machinery could be misled by anything which was patently no more than the exuberant enthusiasm of a satisfied customer, but in such matters we understand that we are to insist upon the most literal truthfulness (*Federal Trade Commission v. Standard Education Society*, 302 U. S. 112, 116 (25 F. T. C. 1715)). Nor is it an excuse for a statement after it is known to be false that it is put forward as a quotation (*United States v. John J. Fulton Co.* (33 F. (2d) 506, 507 (C. C. A. 9)).

"The last of the misleading statements is that 'contractors all over the world testify' that operating cost of the Moretrench system is 50 percent lower than that of any other. This was part of the same obscure advertisement we have just mentioned, and of another, equally obscure, published 13 months later. Literally speaking, it was, of course, untrue; contractors 'all over the world' did not testify as they were quoted. As this was the only part found to have been false, it is again hard to imagine how anyone reading it could have understood it as more than puffing; yet for the reasons we have just given, if the Commission saw fit to take notice of it, we may not interfere."

The recent case of *Jacob Siegel Company v. Federal Trade Commission* (150 F. (2d) 751), decided in 1944 by the Circuit Court of Appeals for the Third Circuit, is an excellent demonstration of the extent to which the hands of the reviewing courts have been tied by the development over the years of the inhibition against any exercise of judgment with respect to the quality of the evidence relied on by the Commission, as well as the remedy prescribed by the Commission. In this case, the circuit court felt strongly that the Commission's order was far too harsh, and stated that if the court were still in control of the remedy, it would modify the order. It is also rather evident from the court's opinion that it felt that the evidence relied upon by the Commission, although "substantial," was against the weight of the evidence.

In the Siegel case, the Commission ordered the petitioner to cease and desist from using the word "Alpacuna" to describe the coats which it manufactured, which were made of a combination of alpaca, mohair, and wool fibers, on a cotton backing. The company had used the word to describe coats of this cloth since 1930. The Commission found that the word was misleading and deceptive, as

representing that the coats contained fiber obtained from the animal known as vicuna (pp. 752, 753) :

"According to the petitioner's testimony, which was not contradicted, the name 'Alpacuna' was created by its sales manager who used a fanciful variation of the word 'alpaca,' which animal represented 50 percent of the wool fibers in the fabric. To alpaca the suffix 'una' was added partly in order to obtain a word that was very easy to pronounce and partly to signify that the Siegel Co. was the one manufacturer and the first to make the coat. The head of the Siegel Co. testified that he did not have vicuna in mind at all in connection with the name 'Alpacuna.' He said further: 'I was not familiar with it [vicuna] and I have been in business for 30 years and only in the last 5 years or 6 years I have heard of vicuna. I was not interested in it. We never used it.' It is undisputed that the vicuna is one of the rarest of animals. It is found principally in the high mountains of Peru and is of the llama family. In order to obtain its hair, the animal itself has to be killed. Such killing is regulated by law. Vicuna hair is one of the softest, finest animal fibers but has poor wearing qualities. Only a small amount of the fiber comes into the United States. The overcoats made from it are valuable and run as high as \$900. The 'Alpacuna' coats retail at \$40.

"Strong testimony was presented supporting the petitioner's proposition that 'Alpacuna' is a proper trade name for the particular coats and that the name does not represent to the public that the coats contain vicuna fiber. There was evidence of a poll taken in the particular section of a large New York department store where such coats were sold. Over 200 customers chosen at random were questioned and not one of them declared that the name 'Alpacuna' indicated vicuna to them. There were numerous other witnesses, including members of the public, reputable people in the clothing trade, department store specialists in protecting customers, a representative of clothing workers, a textile expert, etc. A person connected with the National Better Business Bureau stated he has never received a complaint regarding the name 'Alpacuna.' One of the functions of that organization is to receive complaints as to merchandise. The only person in the country who manufactures vicuna coats sent a letter to the Commission saying that he had no objection to the use of the name 'Alpacuna' by petitioner. In addition to the direct defense testimony, some of the Government witnesses supported the defense contention affirmatively by testimony to the effect that 'Alpacuna' did not mean vicuna content to them; there were other Government witnesses whose testimony was weak; and still others indicating prejudice or bias.

* * * * *

"Petitioner next stresses the point that vicuna animal fiber and its qualities are not generally known to the public. It calls attention to the admitted rarity of the animal. One expert for the Commission stated that it is almost extinct. * * * It is contended that the thought of the \$40 'Alpacuna' coat capitalizing on the term vicuna is far-fetched since most of the potential customers do not have the least idea as to vicuna and the few who do readily understand that a coat for large production and in the lower price field could not be produced from vicuna fiber."

The Commission also produced an array of witnesses who associated vicuna with the word "Alpacuna." These witnesses included representatives of stores who, presumably, did not handle the petitioner's coats; but the court pointed out that even if it assumed that some of the testimony on behalf of the Commission was prejudiced or biased, the court could not intervene whatever its thought, if the Commission wished to rely upon such testimony. The opinion continued (p. 754) :

"Obviously, from the above very brief outline of the evidence, the petitioner has made an impressive showing in its effort to retain the name 'Alpacuna.' The Siegel Co. is a well-known and highly regarded concern and its coats have achieved considerable popularity in their own price range. They are widely publicized and large sums of money have been expended by the Siegel Co. and various retail stores in merchandising them. The Siegel Co. coined the name for the coats in 1930, and has been using it since that time. At this time it is a valuable asset not only to the company but, as the *amicus curiae* brief points out, to certain retail establishments throughout the United States.

"Just as obviously, it clearly appears that there is substantial evidence supporting the Commission's decision. * * * Upon the whole record the Commission made a finding that the name 'Alpacuna' is misleading and deceptive to a substantial portion of the purchasing public in that it represents or implies to such persons that the coats contain fiber obtained from the animal known as

vicuna. The likelihood of misleading the class of customers with which the petitioner generally deals seems slight but in view of the testimony that some of the purchasing public believes that 'Alpacuna' implies vicuna content, we cannot say that the finding is not supported by substantial evidence or that the order to cease and desist from the use of the word 'Alpacuna' which the Commission issued in consequence of the finding was without foundation. Even assuming that some of the testimony on behalf of the Commission was prejudiced or biased as contended, if the Commission wished to rely upon such testimony, we may not intervene whatever our thought" (*Segal v. Federal Trade Commission*, 2 Cir., 142 F. 2d 255.).

After pointing out that the court could not appraise the evidence, that absence of any effort to deceive did not affect the Commission's finding, and that the Commission did not have to show any actual deception, the court proceeded to deplore the fact that it could not modify the Commission's order which forbade the use of the established trade name completely (p. 755):

"Although we sustain the Commission on its finding as to the name because of substantial evidence supporting that finding, we think strongly that the order is far too harsh. It destroys a widely and favorably known trade name, in existence for 14 years. It causes serious injury to the petitioner and its retail outlets. The infraction, as the case now stands, is slight and could be cured by simple qualifying language. We could dispose of the problem by modifying the Commission's order as suggested, if the practice as outlined in *Federal Trade Commission v. Royal Milling Co.* (288 U. S. 212, 53 S. Ct. 335, 77 L. Ed. 706) and *Federal Trade Commission v. Hires Turner Glass Co.*, supra, a third circuit case, was still the law, * * *.

* * * * *

"The second circuit, which several times on the authority of the Royal Milling decision, had modified orders of the Federal Trade Commission has now recognized this in a series of opinions commencing with *Herzfeld v. Federal Trade Commission* (140 F. 2d 207).

* * * * *

"It is evident, therefore, that the discretion as to the remedy in such controversy as this has now been vested in the Federal Trade Commission. That discretion has been exercised to totally prohibit the use of the name 'Alpacuna' to the petitioner. Since the Commission has such power, we are unable, in view of the evidence, to say that the power has been abused in this instance, though under the same facts and circumstances, if we were still in control of the remedy, we would modify the order as above indicated."

With obvious reluctance, the court adhered to its decision on a rehearing of September 20, 1945, stating per curiam (150 F. (2d) 756):

"After carefully considering the question of possible modification of the Federal Trade Commission's order, we feel compelled to adhere to our original decision which we confirm."

We believe, and we submit that the foregoing cases demonstrate, that the amendment of section 5 (c) of the Federal Trade Commission Act provided by H. R. 2390 is of very great importance, and is necessary to avoid substantial injustices under the Federal Trade Commission Act as it now exists and is interpreted by the courts. We are convinced that the proposed amendment is in the public interest not only as a preventive of injustice to individuals, but also because the moderate censorship by the circuit courts of appeal, which the amendment makes possible, will be a valuable guide to the Federal Trade Commission in turning its attention from "trivial niceties" which are "too impalpable for practical affairs, * * * will-o'-the-wisps which divert attention from substantial evil." This is no reflection upon the ability or sincerity of the Federal Trade Commission, nor upon the value of the work which it has done. The evils which the amendment will eliminate are inherent in the Federal Trade Commission Act itself.

THE PROPOSED AMENDMENT OF SECTION 5 (1), CLARIFYING PENALTIES FOR VIOLATION OF THE COMMISSION'S ORDERS

The Federal Trade Commission Act was amended in 1938 to provide for the imposition of civil penalties for violation of the Commission's orders. Under the act, as amended, an order of the Commission becomes final 60 days after the date thereof, if no petition for review has been filed within that time. After an

order has become final, violations are subject to a civil penalty of "not more than \$5,000" for "each violation." Such penalties may be recovered by the United States in a civil action.

There is nothing in the act to indicate what is meant by "each violation," and apparently no attempt has been made in the few cases that have arisen to date, under the act as amended, to define the term "violation"—very possibly because both sides preferred not to raise the point. If, as has been suggested, every single publication of an advertisement could constitute a separate violation, the aggregate penalty for violation of a cease-and-desist order of the Commission might run into fantastically high figures. In the case of many commodities, the penalty might likewise be astronomical if each single sale were considered a separate violation.

Such penalties would have no relation whatever to any monetary damage to the public, to competitors, or to the Government. For example, merchandise sold pursuant to an advertisement which violates an order of the Commission may be as good as the customer supposed he was buying, or better; nevertheless there may be a violation of the Commission's order and a substantial penalty therefor. For instance, in *Federal Trade Commission v. Royal Milling Co., et al.* (288 U. S. 212), respondents who were not grinders of wheat were ordered to cease and desist from using such names as "Royal Milling Company" unless such names were accompanied by an explicit representation that the respondent was not a grinder of the grain from which the flour prepared and put out was made. The court stated (p. 216):

"* * * If consumers or dealers prefer to purchase a given article because it was made by a particular manufacturer or class of manufacturers, they have a right to do so, and this right cannot be satisfied by imposing upon them an exactly similar article, or one equally as good, but having a different origin. Here the findings of the Commission, supported by evidence, amply disclose that a large number of buyers, comprising consumers and dealers, believe that the price or quality or both are affected to their advantage by the fact that the article is prepared by the original grinder of the grain. The result of respondents' acts is that such purchasers are deceived into purchasing an article which they do not wish or intend to buy, and which they might or might not buy if correctly informed as to its origin."

The courts have held that the purpose of the Federal Trade Commission Act is protection of the public, no punishment of a wrongdoer (*Federal Trade Commission v. Klesner*, 280 U. S. 19, 27; *Royal Banking Powder Co. v. Federal Trade Commission*, 281 Fed. 744, 752). It is submitted that the public interest can best be protected by the provision of penalties large enough to be an effective deterrent, but not so large as to be confiscatory or a possible instrument of oppression. The proposed amendment provides a penalty of \$1,000 for "each violation, not to exceed the sum of \$10,000 in the aggregate." Such a penalty provision should be adequate for the purpose of the act.

THE PROPOSED AMENDMENTS TO ELIMINATE DUAL PROCEEDINGS UNDER THE FEDERAL TRADE COMMISSION ACT AND THE FEDERAL FOOD, DRUG AND COSMETIC ACT

These amendments will, to some extent, eliminate a situation which has arisen in at least two reported cases. In these cases not only was there a duplication of proceedings against the same company, upon the same state of facts, but the Government attempted to find against the company in the second proceeding, after a finding favorable to the company in the first.

In *George H. Lee Co. v. Federal Trade Commission*, (113 F. (2d) 583), the Government had brought an earlier proceeding against the petitioner claiming that its product was misbranded, by reason of statements on labels and circulars, in violation of the Food and Drug Act. In that proceeding, the court had resolved the issues in favor of the petitioner after a trial, and dismissed the proceeding. Thereafter the Federal Trade Commission issued a complaint charging the petitioner with the use of unfair methods of competition under the Federal Trade Commission Act, and the Commission found that the same representations (on labels, pamphlets, and other advertising matter) upon which the earlier libel proceeding had been based were false and misleading. Although the circuit court, on petition for review of the Commission's order, vacated the order because, as it found, the issue had already been settled in petitioner's favor by a court of competent jurisdiction, the petitioner had been put to the trouble and expense of the Federal Trade Commission proceeding and the court review, after a favorable determination on the same issues under the Food and Drug Act. The following excerpt from the court's opinion is of interest (p. 585):

"* * * It is apparent, however, that the Government—having failed, in the libel proceeding, to secure a determination that the 'Gizzard Capsules' were misbranded and that the representations made by the petitioner on labels and circulars were false * * * —then initiated this proceeding through the Federal Trade Commission to secure a determination that the same or substantially the same representations which were asserted to be false and fraudulent in the libel proceeding were in truth and fact false and misleading and therefore constituted an unfair method of competition in commerce within the meaning of the Federal Trade Commission Act. Although the remedies sought by the Government in the two proceedings were different—condemnation in the first, and a cease-and-desist order in the second—it is obvious that the alleged falsity of the representations of the petitioner with respect to the therapeutic value and effectiveness of its product constituted the main basis for each of the proceedings; that in the libel proceeding the court determined that the representations that the product was a remedy for tapeworms and pinworms as well as large roundworms were not false, while the Commission later determined that the representations with respect to pinworms and large tapeworms were false and misleading. It is equally obvious that the Commission completely disregarded the effect of the decree entered in the libel case on conducting its proceedings and in making its findings of fact, conclusions of law, and order."

In *United States v. Willard Tablet Company* (141 F. (2d) 141), the opposite situation arose. After the Federal Trade Commission had determined that certain statements were not false, a libel proceeding was brought under the Food, Drug, and Cosmetic Act charging misbranding upon the basis of the identical statements. As the court said (p. 143):

"We, therefore, have the incongruous situation of one branch of the Government approving the method now pursued by the claimant and another branch seeking to condemn. This is, to say the least, placing claimant in an embarrassing situation and should be avoided if possible."

The circuit court sustained the order of dismissal of the district court, but again the respondent had been subject to unnecessary trouble and expense.

Had both governmental agencies found the representations in the above proceeding to be false, the imposition of different penalties for the same acts would have been unfair. As it was, with one agency attempting to enforce its remedy while the other had found the representations to be proper, the situation was indefensible.

The proposed amendment provides a necessary and proper demarcation of jurisdiction, at least as far as representations upon packages and accompanying circulars are concerned.

Respectfully submitted.

CHADBOURNE, WALLACE, PARKE & WHITESIDE.

NEW YORK, N. Y., January 24, 1946.

DRUG, CHEMICAL AND ALLIED TRADES SECTION,
NEW YORK BOARD OF TRADE, INC.,
New York 7, N. Y., March 20, 1945.

Re Reece bill (H. R. 2390) to amend F. T. C. Act

HON. B. CARROLL REECE,

House of Representatives, Washington, D. C.

DEAR SIR: We enlist your support in the passage of the bill referred to above, and for your information quote below a resolution which was unanimously adopted at the meeting of the executive committee of the drug, chemical and allied trades section of the New York Board of Trade, held March 15, 1945.

"*Be it resolved*, That the drug, chemical, and allied trades section of the New York Board of Trade urges the enactment of H. R. 2390, a bill to amend the act creating the Federal Trade Commission, to define its powers and duties, and for other purpose; and be it further

"*Resolved*, That copies of this resolution be sent to the Committee on Interstate and Foreign Commerce and to the New York Members of the House of Representatives and of the Senate of the United States."

Very truly yours,

CARL M. ANDERSON,
Chairman, Legislative Committee.

CHAMBER OF COMMERCE OF THE STATE OF NEW YORK

[NOTICE.—This report was mailed to all members of the chamber 5 days before the meeting and copies were also placed in the hands of each member attending the meeting, when opportunity was given for discussion. The vote thereon therefore can fairly be said to represent the opinion of the entire membership. The meetings of the chamber are attended by three or four hundred members]

At the regular monthly meeting of the Chamber of Commerce of the State of New York, held December 6, 1945, the following resolutions and report, submitted by its committee on law reform, were unanimously adopted:

AMENDMENT TO THE FEDERAL TRADE COMMISSION ACT

To the Chamber of Commerce:

The committee on law reform offers the following resolutions:

Resolved, That the Chamber of Commerce of the State of New York urges enactment into law of the Reece bill, H. R. 2390, to amend the Federal Trade Commission Act, the purpose of which is to—

(1) Afford effective judicial review of the Commission's cease-and-desist order;

(2) Put a ceiling on the aggregate amount of penalties which may be assessed for a single violation of these orders; and

(3) Avoid duplication of administration between the Commission and the Food and Drug Administration; and, be it further

Resolved, That copies of this report be sent to the President and the Members of Congress.

The chamber has gone on record on various occasions against the arbitrary procedure of Government agencies, bureaus, and commissions. Congress has given to some Government agencies, not only the power to make rules, but also to construe and enforce them. Accordingly, such agencies possess the legislative, executive, and judicial power, and these three powers are all possessed by one and the same personnel, not one of whom is elected by the people. Over and above all this the defendant is given little opportunity to appeal to the courts of law.

This bill would give appeals and a review of the Commission's orders "to cease and desist" from using a method of competition. A review can be had in the circuit court of appeals, and ultimately, if so desired, in the United States Supreme Court by certiorari proceedings.

False advertising, other than labeling, means an advertisement "which is misleading in a material respect." In determining this matter, consideration must be given to "not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations so as to prevent deception resulting from indirection and ambiguity, as well as from statements which are false."

The term "labeling" is defined to mean all labels and other written, printed, or graphic matter which may accompany the article.

A penalty of \$1,000 for each violation, not to exceed the sum of \$10,000 in the aggregate, is provided.

This measure will not apply to articles covered by the Federal Food, Drug and Cosmetic Act, approved June 25, 1938.

Respectfully submitted.

LAWRENCE B. ELLIMAN, *Chairman*,
WILLIAM S. KIES,
FLETCHER H. MONTGOMERY,
ARTHUR J. MORRIS,
ALFRED V. S. OLCOTT,
CLYDE S. STILWELL,
GEORGE E. WARREN,
Committee on Law Reform.

Attest:

LEROY A. LINCOLN, *President*,
B. COLWELL DAVIS, JR.,
Executive Secretary.

NEW YORK, December 6, 1945.

THE CREAM OF WHEAT CORP.,
Minneapolis 13, Minn., January 23, 1946.

BRIEF

As an introduction to my argument I will state that many years ago I was involved in a suit brought by the Federal Trade Commission, which, in my opinion, resulted in a serious miscarriage of justice which would not have occurred had the bill in question been a law at that time. The case resulted in no benefit to anyone, and no changes were effected in practice which had been in effect for some years. The only result was finding a guiltless firm guilty, and the expenditure of immense amounts of time and money. The FTC participants in that case were not vicious men. In my opinion they were merely prejudiced men with enthusiasm for convictions.

This is not the time and place to retry that case—I am simply mentioning it to show that what I am saying is not just theory, but is the judgment of one individual who has been through the mill.

The FTC has done many useful things. It has a valuable part in our system of government, but its powers are so absolute that it clearly has the power to commit the gravest sort of injustices. As you know, the FTC is an agency which combines all in one the duties and powers of investigator, prosecutor, judge, and jury. As a rule, the individual men who exercise these duties not only are acquainted with each other, but they travel together, stay at the same hotels at the same time, etc. Even when these men happen to be comparative strangers, they all work for, take instructions from, and get paid by the same organization. If this is not an ideal set-up to encourage abuse of power, history must be wrong.

I have heard it said by the uninformed that as decisions resulting from this set-up are subject to review by the courts, the citizen has proper protection—that if he has been unjustly treated he can appeal. I have even heard this set-up compared with that of the Interstate Commerce Commission.

Taking the latter comparison first, there are great fundamental differences, particularly in regard to the ordinary citizen or business firm. As an employee of such a firm I have, over the years, had considerable contact with the ICC. All of such dealings have been in connection with rate matters involving differences between shippers and railroads. In these cases the ICC acted primarily as an impartial judicial body in settling conflicts between shippers and carriers. In such cases, which occupy so much of its time, the ICC is subject to conflicting urges, as well as acting as a judge between conflicting parties. On the one hand, it is interested in seeing that shippers get good value for their money, and on the other hand it is interested in seeing that carriers do not bankrupt themselves by dissipating their revenues.

Furthermore the ICC handles mostly matters that require specialized training in the very intricate and involved subject of transportation. On the other hand, the FTC cases generally involve matters which are exactly within the traditional scope of judicial judges.

As I see it, the FTC cases seem to be prosecution of persons by a governmental agency on its own initiative with very little of the substance of judicial action.

Now getting back on the main track: It is true that one may have conclusions of law reviewed by the court, but the court's so called review of the facts is an admitted mockery. It has happened that in some trials the FTC has been able to prove only a sketchy sort of case, whereas the accused has been able to present a powerful and sound defense supported by all kinds of reputable evidence. Even in such cases the Commission has the power, if it so chooses, to decide the case against the overwhelming weight of evidence, provided it has been able to produce a connecting thread of evidence that will support its conclusion. In other words, if the Commission chooses to do so it could put a none too reputable witness on the stand who would testify to enough facts on which to build what might be called a substantial case, and it could then sit back, after hearing many reputable witnesses testify to the contrary, and proceed nevertheless to make its decision based upon the testimony of its own single witness.

For instance, in certain types of cases such as those brought by the FTC designed to break up basing point systems, the FTC had apparently made up its mind that it wanted to eliminate certain long-existing business practices, and then proceeded to present evidence to itself in a supposed judicial capacity. It seems quite evident to me that the Commission had already had its mind made up in advance so that it was practically all set to decide the case in the way

which it wished, and it was of course certain to get sufficient evidence in the record to permit the upholding of its views.

That it has this power is evident from the following cases (references supplied me by our attorney): *Federal Trade Commission v. Pacific States Paper Trade Association* (273 U. S. 52, 63); *Federal Trade Commission v. Algoma Lumber Co.* (291 U. S. 67, 73); *Federal Trade Commission v. Standard Education Society* (302 U. S. 112, 117); *Hersfeld v. Federal Trade Commission* (140 Fed. 2d 207); *Segal v. Federal Trade Commission* (142 Fed. 2d 255).

In the last case the court said (p. 255):

"Hence the outcome turns, as it so generally does, upon whether there was 'substantial' evidence to support the Commission's finding. It is true that a part of the testimony was obviously biased, coming as it did from a witness whose sole occupation appears to have been to suppress the importation of any foreign goods whatever. Even so, if the Commission wished to rely upon such testimony, we may not intervene, whatever might be our own indisposition to accept what he said."

In this connection it is very appropriate to quote in part an address made by United States Circuit Judge John D. Martin of Tennessee, delivered on October 18, 1945, and printed in the American Bar Association Journal of December 1945. Speaking as one of the Federal judiciary he said in part as follows:

"No more startling innovation has come about within the past decade than the widespread building up of administrative tribunals in derogation of the judicial power, which some of us have thought was firmly vested by the Constitution in the courts alone.

"So frequently have we been reminded of our inferiority in expertness to various administrative boards and agencies exercising more than quasi-judicial powers but still subject to our review upon petitions for enforcement of their orders, that some fortitude on the part of a circuit judge is necessary for avoidance of an inferiority complex. So steadily has our power of independent decision been curtailed by acts of Congress and interpretative opinions of the Supreme Court, that we sometimes wonder whether we are considered inferior courts in an actual as well as in the comparative sense of the word 'inferior' as used in the Constitution.

"Our practical function in the review of rulings of administrative boards has been reduced to reading records for possible discovery of that rare case wherein there is no evidence, however slight, from which the Board could reasonably have drawn inferences upon which a finding of fact was based. We have been repeatedly and emphatically warned that we dare not substitute our own inferences from fact for those of the Board; and in tax cases, the mystery remains unsolved as to what constitutes a plain mistake of law made by the 'better staffed' Tax Court, formerly the Board of Tax Appeals, whose decisions, upon petition, we must continue to review.

"To my thinking, it is not in the public interest that the seal of a United States circuit court of appeals should, by compulsion, become a rubber stamp for the approval of the all too often arbitrary action of an administrative agency. Unless, through acts of Congress, the people restore to the United States circuit courts of appeal a modicum of their former significance in the scheme of National Government, their present partial eclipse may soon become total. A fair appraisal of the record of these intermediate appellate tribunals would impel the conclusion that they deserve a higher degree of faith in their intelligence, efficiency, and expertness in the administration of justice than has been evinced in the gradual divestiture of their right to reason and to render judgment with appropriate independence."

I think it is clear that we have a set-up where the FTC for any reason, such as prejudice, caprice, political pressure, or just plain mistake can with impunity convict almost anyone against whom any witness wishes to testify, without danger of being reversed by the courts. With its present personnel no one expects the Commission to use these powers to the utmost—à la Petrillo, but they could if they wanted to, and the dangerous situation is right there for all who wish to see. Furthermore, there are persons who are convinced that the Commission has already badly abused its powers.

This bill, H. R. 2390, does not attempt to correct all the faults of the administrative procedure. It takes only one step in that direction, but it is a valuable and important step. In my opinion, it should be taken right now without waiting for the more extensive and far-reaching reforms incorporated in S. 7 (entitled "A bill to improve the administration of justice by prescribing fair administrative procedure").

We have fought a great war and are trying to fight a great peace to secure and preserve the freedom of the peoples of the earth. Let us be consistent and also free our own people from the grosser forms of administrative persecution and give back to us some of the rights we thought had been secured for us under the Constitution and Bill of Rights.

G. V. THOMSON,
Vice President and Secretary.

ASSOCIATED DRUG & CHEMICAL INDUSTRIES OF MISSOURI, INC.,
St. Louis, Mo., January 25, 1946.

To the COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,

Washington, D. C.

GENTLEMEN: The members of the Associated Drug and Chemical Industries of Missouri, which association comprises all the leading manufacturers of drugs, chemicals, and cosmetics in this State, unanimously favor the passage of H. R. 2390, which is presently before your committee. Attached hereto are its brief arguments in favor of the passage of said bill.

This association respectfully requests your most favorable consideration.

Yours very truly,

ASSOCIATED DRUG & CHEMICAL INDUSTRIES OF MISSOURI, INC.,
By JOHN A. MUELLER, *Cochairman, Legislative Committee.*

H. R. 2390, introduced by the Honorable B. Carroll Reece of Tennessee, proposes to amend certain aspects of the act creating the Federal Trade Commission in the following particulars:

A. SECTION 5 (c)

1. Provides that a person, partnership, or corporation may appeal an order of the Commission to the United States circuit court of appeals praying that the order be modified or set aside.

2. Authorizes the circuit court of appeals to modify the order of the Commission as in its judgment the circumstances of the case may require.

Comment.—The original act authorized the appellant to pray that the order of the Commission be modified or set aside. The original act gives the court authority to modify the order. Thus, the only change here proposed is to allow the person, partnership, or corporation involved to seek modification. Although the court has had power to modify the order all along, they have so interpreted their authority as to reduce their control of the remedy to a nullity. With the amendment here proposed, the appellant can properly set forth his reasons and arguments why the order should be modified and thus acquaint the court with facts which otherwise might not come to the attention of it. It is felt that this proposed amendment does not in any way change the act, but merely provides language that more clearly expresses Congress' intent.

3. Requires that the findings of the Commission be supported by the preponderance of the evidence in order to be conclusive.

Comment.—The original act stated that the findings of the Commission as to facts were conclusive if supported by "evidence." From time immemorial, lawsuits have been decided by the preponderance of the evidence, and it is believed that Congress intended all along that the Federal Trade Commission's findings must be based upon a preponderance of evidence rather than on a mere scintilla. But under the wording of the original act, the courts have repeatedly stated that their hands are tied and that they are not authorized by the act to weigh the sufficiency of the evidence. The courts have held that so long as there is some evidence which supports the findings of the Commission that they are obliged to accept these facts as conclusive. This is not justice.

The Supreme Court of the United States has held that this act does not offend the due-process clause of the Constitution since the act contains a provision for judicial review. However, do we have true judicial review when the appellate court is restrained from determining whether or not the findings of the Commission are based upon a preponderance of the evidence? As an administrative agency of the Government, the Federal Trade Commission is the complainant, investigator, prosecutor, judge and jury. As judge and jury, it can scarcely be unbiased when it is also the complainant and prosecutor. If some evidence

only—rather than a preponderance of the evidence—is all that is required to make its findings conclusive, it is impossible that substantial justice can be done.

It is not believed that Congress ever intended that this situation exist, and it is felt that the courts have misinterpreted Congress' meaning. In order to clarify the intent of Congress, the proposed amendment inserts the words, "the preponderance of the" before the word "evidence" wherever it appears, and thus leaves no further room for misunderstandings by the court.

B. SECTION 5 (1)

1. Makes the penalty for each violation \$1,000.
2. Sets a ceiling of \$10,000 in the aggregate for violation of a single order.

Comment.—The original act provided a maximum penalty of \$5,000 for each violation of the Commission's orders. No aggregate total sum is set out. Using false advertisement as an example, each single advertisement constitutes a violation of the order. Were the courts to impose the maximum penalty for each advertisement published, a fine large enough to destroy an offender could legally be imposed. The courts have not as yet imposed fines of so large a sum as to be completely destructive. However, as the law now stands the Federal Trade Commission may ask the courts to impose the maximum penalty where in the aggregate that penalty would wipe out the offender. The Commission may use the threat of this as a sword over the heads of many concerns.

Certainly it is only just that some ceiling be set. As Mr. Reece himself has so aptly stated it, "The amount of the ceiling is not important. The principle is." It has long been said that the power to tax is the power to destroy. Let it never be said in the United States that the power to penalize is the power to destroy.

C. SECTION 15 (A), SECTION 15 (F) (ADDED) AND SECTION 19 (ADDED)

1. Certain involved phrases are stricken in section 15 (a) and the following substitution is proposed: "So as to prevent deception resulting from indirection and ambiguity, as well as from statements which are false."

2. A definition of the term "label" is given in section 15 (f).

3. Matters coming under the jurisdiction of the Food, Drug and Cosmetic Act are removed from the jurisdiction of the Federal Trade Commission insofar as the Food, Drug and Cosmetic Act as exclusive jurisdiction.

Comment.—There can be no doubt that Congress intended that certain authority be delegated to the Federal Trade Commission and certain authority to the Food, Drug and Cosmetic Act. The proposed change in section 15 (a) and the new sections 15 (f) and 19 merely more clearly define and explain what matters come under which governmental agency. Congress never intended that the duties of these two administrative bureaus should overlap, causing them to step on each other's toes. However, by the original wording of section 15 (a) the Federal Trade Commission's interpretation was that it must regulate advertising in regard to representations which Congress intended to come within the scope of the Food, Drug and Cosmetic Act. Control of representatives regarding qualities of foods, drugs, devices, and cosmetics has been delegated under the Food, Drug and Cosmetic Act. The Federal Trade Commission was delegated jurisdiction over false advertisement, or advertising that was deceptive by means of indirection or ambiguity. The proposed new wording more clearly sets out the degree of control and authority the Federal Trade Commission is given so that it will not encroach upon matters which properly come under the Food, Drug and Cosmetic Act.

New section 15 (f) defines the term "labeling." There is a great distinction between a label and an advertisement. The original act specifically states that labeling is excluded from the term "false advertisement." However, the act did not undertake to define the term "labeling" and because of this confusion has arisen. By incorporating a definition of the term "labeling" into the act, there should no longer be the confusion which up until the present time has existed.

New section 19 removes from the jurisdiction of the Federal Trade Commission foods, drugs, devices, and cosmetics insofar as they come under the Federal Food, Drug and Cosmetic Act. It is felt that Congress never intended that any dual jurisdiction exist, but experience has proven that it has. It is necessary for the proper conduct of a business that the interpretations of one governmental agency be relied on. It is not proper that one governmental agency give a go sign while another governmental agency gives a stop sign on the same matter. Congress did not intend this, but it has in fact existed. The proposed

new section places controls where they should be, and where it is believed Congress intended them to be.

In summarization, it is not believed that H. R. 2390 deprives the Federal Trade Commission of any of its rights, authorities, or duties that Congress intended to bestow upon it. The changes proposed are concise and self-explanatory, and they merely set out more clearly the original meaning and intent of the Congress.

Respectfully submitted,

ASSOCIATED DRUG & CHEMICAL INDUSTRIES OF MISSOURI,
By JOHN A. MUELLER,
Cochairman, Legislative Committee.

LAW OFFICES OF CHARLES WESLEY DUNN,
New York, N. Y., February 18, 1946.

Re H. R. 2390.

HON. B. CARROLL REECE,
House Office Building, Washington, D. C.

DEAR MR. REECE: I write this letter in behalf of the Grocery Manufacturers of America and the American Pharmaceutical Manufacturers' Association, for insertion in the record of the hearings on this bill; and I add that it expresses my own view as well.

This bill amends sections of the Federal Trade Commission Act; and we approve the amendments thus made, as and to the extent now stated:

Section 5 (c): We approve its amendment whereby the Commission's findings as to the facts are only conclusive, on the court review of a cease and desist order, "if supported by the preponderance of the evidence." For this is the right and just rule of evidence, in the circumstances.

Section 5 (1): We approve its amendment to place a reasonable ceiling on the aggregate amount of a civil penalty for the violation of a final cease and desist order. For such a ceiling is manifestly indicated.

Section 15: We approve its amendment to add a new paragraph (f), which defines the term "labeling" as in the Federal Food, Drug, and Cosmetic Act. For this paragraph was erroneously omitted from that section, when it was enacted; and it contains a necessary definition.

Section 19: We approve the addition of this section, to provide that food, drugs, devices, and cosmetics shall be exempt from this act to the extent of the application or extension thereto of the Federal Food, Drug, and Cosmetic Act. For such a provision will operate to eliminate jurisdictional conflict between the Federal Security Agency, in administering the aforesaid act, and the Federal Trade Commission, in administering the supplemental law against a false advertisement of food, drugs, devices, and cosmetics, enacted by the Wheeler-Lea amendment of the Federal Trade Commission Act. But it is added: we recommend that such false advertising law should be transferred to the Federal Food, Drug, and Cosmetic Act, as a matter of public policy and in the interest of all concerned. For the Federal law against the adulteration, misbranding, and false advertisement of food, drugs, devices, and cosmetics is best consolidated in that act, for unified administration by the Food and Drug Administration of the Federal Security Agency.

Respectfully yours,

CHARLES WESLEY DUNN.

INTERNATIONAL APPLE ASSOCIATION,
Washington, D. C., February 15, 1946.

HON. B. CARROLL REECE,
New House Office Building, Washington, D. C.

MY DEAR MR. REECE: You recently addressed a letter to our association asking for our views on your bill amending the Federal Trade Commission Act, H. R. 2390. Since it was impossible for a representative of our association to appear at the hearings on this bill I am very glad to state our position at this time.

The International Apple Association has a direct and vital interest in matters such as that covered by H. R. 2390. The association is a nonprofit organization of growers, shippers, and distributors of apples and pears. Its membership is located in all of the important producing sections and distributing markets of the United States. It is composed of the leading apple and pear growers and shipping organizations, individual shippers and firms, apple and pear cooperative

associations, wholesale dealers, distributors, exporters, and our members interested in other lines of our industry. In addition, its membership extends to many foreign countries, including Canada, the United Kingdom, Continental Europe, South America, and Australasia. The International Apple Association is now in its fifty-second year, one of the oldest agricultural associations in the United States, and is representative of the apple and pear industries of the United States.

The association wishes to go on record as endorsing the amendments which H. R. 2390 would make to the Federal Trade Commission Act, as contained in sections 1, 2, 3, and 4 of this bill.

Because of the many regulations, administered by various Government agencies, under which our and other agricultural industries have to work, we consider it highly desirable that wherever possible these regulations be coordinated under one agency. For that reason we would welcome the amendments contained on page 5 of your bill, lines 10 to 16, providing that wherever the Federal Food, Drug, and Cosmetic Act applies that action as administered by the Federal Security Agency will govern.

At the present time the many agencies regulating our industries add considerably to the burdens of our members and we are very anxious to see that this new section to the Federal Trade Commission Act is added without delay.

Sincerely yours,

SAMUEL FRASER,

Secretary, International Apple Association.

THE SOUTHERN COMMISSIONERS OF AGRICULTURE.

Memphis, Tenn., February 15, 1946.

Memorandum for Hon. B. Carroll Reece, House Office Building, Washington, D. C.

On February 6, 1946, this writer sent a memorandum to Col. James B. Murphy, our attorney, 1206 Palmetto Building, Columbia, S. C., copy to Mr. Harry D. Wilson, our president, Baton Rouge, La., will quote it:

"As soon as practicable please tell this writer, with return of the enclosed file, whether or not in your opinion the Southern Association should support the Reece bill, H. R. 2390.

"This matter escaped the writer's attention until he read an editorial clipped from the Journal of Commerce, which you will find next attached.

"First opportunity, after seeing the Journal of Commerce editorial discussion of said bill, this writer contacted, over the telephone, Congressman Reece, whom he has known personally for years; like yourself, he is a good businessman and an able lawyer; he hails from Johnson City, Tenn.; has been representing the first district of that State since 1933.

"The Congressman was duly appreciative of our inquiry about the status of his bill, 'To amend the act creating the Federal Trade Commission, to define its powers and duties, and for other purposes'; he has made two speeches in the House suggesting said bill, these you will find in said file.

"Have had some experience with the Federal Trade Commission; recall discussion by attorneys of the conditions referred to, who said that they were unfair, that the bill should be amended * * *. And

"Congressman Reece's bill is, in effect, the amendment said attorneys thought should be made."

Colonel Murphy answers on the 8th; next attached is a copy of his reply. Am following up with President Wilson. Am confident can arrange with Colonel Murphy to appear, both for himself and our association, in support of your bill before the committee handling it. What are your suggestions?

C. C. HANSON, *Secretary.*

cc: Col. J. B. Murphy, attorney, 1206 Palmetto Bldg., Columbia, S. C.; Harry D. Wilson, president, Baton Rouge, La.; and our other 12 members, and friends, individually addressed.

"Social control" of industry will serve only to intensify the evils which it pretends to correct.

In all industry, each legislative move creating new problems seemingly requires new regulation and a new extension of Federal power.

There should be no interference with normal industrial competitive processes—price relationship, productivity, employment and allied factors.

The WATCHMAN.

COLUMBIA, S. C., February 8, 1946.

DEAR COLONEL HANSON: In response to your letter of February 6, 1946, requesting my views on H. R. 2390, introduced in the House of Representatives by Congressman Reece, I have carefully considered this bill in its entirety and unhesitatingly state that in my opinion it is meritorious and strikes at the base of one of the greatest evils our country is now confronting: law by commissions and regulatory agencies not subject to review by the courts.

Immediately the proponents of this school of thought will say, "It is the facts and not the law," but when you circumscribe the facts with long established rules of evidence, you blend them and the question becomes mixed facts and law. In any event, in its final analysis, the facts make the law, for the law is only crystallized public opinion reduced to statutes.

There is nothing to prevent a Commission from hearing one side of a question and thus excluding relevant evidence and, thus, preventing the courts from even hearing evidence on all points at issue.

Webster defines "substantial" as, "of considerable size or amount; vital, important, strong, real solid, true," and thus the testimony of one single witness may be taken and his testimony certified as "substantial," and our courts are now powerless to even look further into the record, although 20 or more other witnesses of unimpeachable veracity might flatly contradict this one witness. The "preponderance of the evidence," the universal rule of law in all civil courts, would cure this flagrant abuse now in practice.

May I give an example of the dangers incident to accepting "substantial evidence?" Military law provides that if the record of trial contains "any" substantial evidence, the case must be held "legally sufficient to support the findings of the court" by the Board of Review (the supreme court of the Army).

I recall a case where an ignorant, illiterate Filipino woman identified a Negro, whom she had never seen before, at a distance of 10 feet on a dark night, and his conviction for murder was sustained as the court considered this "substantial evidence." Other facts pointed to his guilt, but identification was essential. The Board of Review was powerless to take any action. This shows the great danger in departing from the civil rule of a "preponderance" and substituting "substantial".

In these troublesome times, where capital and labor seemingly are "at each others throats," every safeguard possible should be invoked to see that "equal justice" to all is administered, including the innocent bystander, 127,000,000 Americans who are not alined with either capital or labor.

Unhesitatingly, I recommend unrestrained support of H. R. 2390.

Sincerely,

JAMES B. MURPHY, *Attorney at Law.*

NATIONAL DRUG TRADE CONFERENCE,
NEW YORK, N. Y., February 5, 1946.

HON. B. CARROLL REECE,
House Office Building, Washington, D. C.

DEAR CONGRESSMAN REECE: In your consideration of H. R. 2390, the following resolution adopted by the NDTC last December at their annual meeting might be of interest to you:

"Resolved, That the National Drug Trade Conference favors enactment of the necessary legislation to restrict administrative practice wherein the administrative agency serves as prosecutor, judge, and jury, and to provide for impartial, speedy, and capable independent determination of all disputed situations of fact."

Best of good wishes.

Respectfully yours,

RAY SCHLOTTERER,
Secretary-Treasurer.

THE TOILET GOODS ASSOCIATION, INC.,
New York 20, N. Y., May 18, 1945.

Whereas the primary jurisdiction of labeling of foods, drugs, and cosmetics is vested with the Food and Drug Administration, while the primary jurisdiction over the advertising of foods, drugs, and cosmetics is vested in the Federal Trade Commission, and

Whereas it is desirable in the interest of the manufacturers and of the public to avoid duplication of jurisdiction and unnecessary litigation, and to have a single, well-equipped and experienced body in control of both the labeling and advertising of foods, drugs, and cosmetics: Therefore be it

Resolved by the executive board of the Toilet Goods Association, Inc., That sole jurisdiction of both the labeling and advertising of foods, drugs, and cosmetics should be vested in the Food and Drug Administration; and be it further

Resolved, The necessary litigation to that effect is hereby recommended.

THE TOILET GOODS ASSOCIATION, INC.,
By S. L. MAYHAM, *Executive Vice President.*

THE ALBERTY FOOD PRODUCTS,
Hollywood 38, Calif., January 8, 1946.

HON. CLARENCE F. LEA,
House of Representatives, Washington, D. C.

DEAR CONGRESSMAN LEA: May I call your attention to the Reece bill, H. R. 2390, which I understand is to be debated before the House committee some time this month. I earnestly request and beseech your whole-hearted and active support of this measure.

The present Federal Trade Act is unfair, unjust, and un-American. As you doubtless know, at the present time there is virtually no review of FTC actions, thus permitting the Commission to serve as complainant, prosecutor, judge, and jury. This deprives us of the right of all American citizens—a trial by jury.

The existing law ties the courts' hands. They must uphold the Commission even when they are convinced that it is in error. The Reece bill would cure this evil by empowering the court of appeals to review both sides' records of the case. Its decision as to whether or not the Commission had rendered a just verdict then could be based upon the preponderance of the evidence. As matters now stand, the defendant's doom is sealed from the moment that the FTC first issues a complaint.

Defeat of the Reece bill would be a tragedy to virtually all branches of industry. Again, I urge your strong support of this proposed measure.

Respectfully,

THE ALBERTY FOOD PRODUCTS,
ADA ALBERTY.

Mr. RABIN. The committee will stand in recess until 2:30 this afternoon.

(Whereupon at 12:15 p. m. the committee recess until 2:30 p. m. of the same day.)

AFTERNOON SESSION

The subcommittee reconvened at 2:30 p. m., the Honorable Benjamin J. Rabin, presiding.

Mr. RABIN. We will proceed, gentlemen.

Mr. Hoge, how long do you expect to take?

Mr. HOGE. Mr. Chairman, I do not know exactly, not less than 30 minutes, and I hope not more than an hour.

Mr. RABIN. Mr. Murphy, how long do you expect to take?

Mr. MURPHY. I believe I can make my presentation in 10 minutes, sir.

Mr. HOGE. I would be glad to yield to him.

Mr. RABIN. We will hear Mr. Murphy from New York.

Mr. REECE. You are not entirely limited to 10 minutes, of course.

STATEMENT OF CHARLES E. MURPHY, GENERAL COUNSEL, ADVERTISING FEDERATION OF AMERICA

Mr. MURPHY. Mr. Chairman and members of the committee, my name is Charles E. Murphy, and I am general counsel for the Adver-

tising Federation of America. The Advertising Federation of America is an organization representative of all phases of advertising activity throughout our country. Among its active members are national advertisers, advertising agencies, radio broadcasting companies, newspapers, magazine, business paper and farm paper publishers, outdoor advertising companies, graphic art organizations, and other branches of the advertising business. It also includes in its membership local advertising clubs in all parts of the Nation, of which there are about 100.

In 1911, the Advertising Federation of America founded and promoted the Truth in Advertising movement and started a permanent crusade for higher standards of advertising copy. We will exert constant influence for universal honesty in advertising and for increasingly higher levels of taste and of information value.

Many years ago this organization sponsored the formation of vigilance committees, which vigorously policed the advertising of those days. These committees eventually developed into the well-known better business bureaus, of which there are now about 60 in existence and with which the federation still cooperates in furthering their splendid work.

Mr. REECE. So the New York Better Business Bureau developed in this way?

Mr. MURPHY. Precisely, sir; and every other business bureau in this country.

Mr. REECE. Occasionally I have had opportunity to consult the Better Business Bureau up there for some constituent or friend and in all of my experience I have never found an organization that was more vigilant and who rendered a finer service in that respect than that organization and I want to compliment not only the organization but also those responsible for its organization in the first instance.

Mr. MURPHY. It will be a great pleasure for me to take back that message to them. I am sure it will be most heartening in their most wonderful work.

Mr. REECE. And the information which they have developed and presented in some cases has caused me to wonder what kind of an organization they had which enabled them to get such complete information on matters with which you would think they would not be immediately in touch.

Mr. MURPHY. They explore every field of merchandising in New York, all department stores, retail stores, and every other field of merchandising which their staff can physically reach. They have a complete staff who hand in complete reports and then a determination is reached as regards those reports and then it is taken up with the merchants and they try to settle any differences amicably first before proceeding or recommending anything to the authorities.

We have given you this brief background of the Advertising Federation of America so that you will know of our sincerity when we state that we appreciate the outstanding contribution which has been made to advertising by the Federal Trade Commission as one of the regulatory agencies of the Government in our field. We therefore hasten to state that if we were of the belief that any proposed amendment to the Federal Trade Commission Act would dilute or diminish the effectiveness of the Commission in preventing or eliminating false advertising, we would be against such proposed amendment.

As to the provisions of the Reece bill, we have this to say: We are for the proposed amendment to section 5 (c) which would permit the appellate court to modify an order of the Federal Trade Commission and would provide further that the findings of the Commission shall be conclusive only if supported by the preponderance of the evidence. We believe it is a fundamental concept of our jurisprudence that a defendant or respondent should have the right of appeal to an appellate tribunal when he questions the justice of his conviction and has reasonable grounds for questioning it. We also believe that the appellate court should have the right, and the duty, of modifying the ruling where it finds that such ruling is contrary to the law or where it is not supported by the preponderant weight of evidence. Especially do we believe this to be so in matters involving the rulings of a great administrative agency such as the Federal Trade Commission, which by the very nature of its procedure acts simultaneously as the complainant, jury, judge, and counsel.

We have read with profound interest the memorandum, dated March 27, 1945, written to the chairman of your Committee on Interstate and Foreign Commerce by Hon. Edwin L. Davis, Chairman of the Federal Trade Commission, and in which Mr. Davis gives his observations regarding the provisions of the Reece bill. After stating that "the vast majority of such cases are disposed of by the execution of stipulations in which the proposed respondents agree to cease and desist from the continued use of the unfair methods or unfair acts or practices in question," Mr. Davis continues:

With respect to the cases in which formal proceedings are instituted and the cases tried before the Commission, a relatively small percentage appeal from the decisions of the Commission, notwithstanding the fact that every respondent has the undisputed right to appeal for a review of the Commission's cease-and-desist order to a United States circuit court of appeals of his own selection. In a large number of the cases that finally reach the courts, the facts are not disputed.

I query, parenthetically, in anticipation of the Commission's objection to this part of the amendment, how in the world of reason can they object to the inclusion of the clause permitting modification and requiring a preponderance of the evidence, in the light of their statement, knowing Judge Davis, it must be true.

We doubt if anyone is in a position to state how many aggrieved respondents were deterred from filing an appeal because of their belief that the courts, under the present status of the law, seemed reluctant or powerless to upset the rulings of the Commission even where they obviously disagreed with the Commission's ruling. With all due respect to the Commission, we feel that the right of appeal should be complete and unrestricted, and that where the Commission's ruling is not supported by the preponderance of evidence, that the court shall have the right to modify or set aside such ruling.

The term "preponderance" does not mean overwhelming. It means, and we believe it is so intended to mean in the proposed amendment, a superiority in the weight of evidence; a balance in the weight of evidence indicating guilt or innocence. The extent to which that superiority exists in a given case will be up to the Federal Trade Commission to determine in the first instance, and in the event of appeal, then the court shall have the right and duty to decide if, in fact, a preponderance in the evidence does exist.

There is nothing new in this concept; in fact it is typical of your and our idea of American jurisprudence. It exists in the Walsh-Healey Act and in the Commodity Exchange Act.

The adoption of the proposed amendments to section 5 (c) will eliminate one of the few justifiable objections any right-thinking person may have regarding the Federal Trade Commission Act and its administration.

Now I will just address myself, if I may, in two short paragraphs to the other sections of the bill.

With regard to the proposed amendments in the Reece bill which have for their purpose the removal of dual and conflicting jurisdiction by and between the Federal Trade Commission and the Food and Drug Administration, the Advertising Federation of America feels that the objectives of these amendments should be accomplished. We frankly are not certain that the provisions of the Reece bill are the best means of the ends desired in this respect. We would be hesitant to recommend any change in the description of a false advertisement unless and until we feel that such a change is necessary to the removal of the conflicting jurisdiction now existing between the two agencies, and then only in the event that such a change would not have the effect of weakening the safeguards to the consuming public.

No one can read the letter of July 13, 1945, to Representative Reece by Hon. P. B. Dunbar, Commissioner of Food and Drugs, without being impressed with the dangers existing in connection with this conflict between the Federal Trade Commission and the Food and Drug Administration, and we are glad that your committee has given all parties concerned the opportunity to discuss this vital matter so completely.

Those are dangers, I may say, parenthetically, not to the litigating parties, to the respondent or the defendant, but dangers to the consuming public itself, where the Government has found itself, to use the vernacular, behind the well-known eight ball, because of this unfortunate and undesirable conflict.

We are glad, finally, Mr. Chairman and members of your committee, that you have given and will give of your time and careful consideration to these matters. I thank you for hearing me.

Mr. RABIN. Thank you very much, Mr. Murphy.

We will now hear Mr. James F. Hoge, of New York.

STATEMENT OF JAMES F. HOGUE, COUNSEL TO THE PROPRIETARY ASSOCIATION OF AMERICA

Mr. HOGUE. Mr. Chairman and gentlemen of the committee, my name is James F. Hoge, I am a lawyer and my firm is Rogers, Hoge, & Hills, of 41 East Forty-second Street, New York. I appear here today as the attorney of the Proprietary Association of America, which is an unincorporated association, whose membership is made up of manufacturers of so-called proprietary medicines. That association does not include all of such manufacturers, but that association does include by volume of manufacture most of the manufacturers.

I have in my capacity as attorney for individual clients appeared in Federal Trade Commission cases. I mention that only as indi-

cating something of my background. I mention it with no intention whatever of injecting any of my personal cases into the matter or of doing anything which would border on special pleading. I address myself to this bill, with appreciation to the committee and to the Congress for the opportunity, in the earnest belief that the bill deals with two situations which sorely need correction.

The manufacturers for whom I speak today are very much affected by the situation or rather the situations to which this bill is addressed. These manufacturers are subject to the Federal Trade Commission Act as to the advertising of their products, they are subject to the Federal Food, Drug, and Cosmetic Act as to the composition and the labeling of their products. As I shall show you the same subject matter is being dealt with as far as these people are concerned under both laws, and pursuant to these laws they are in the courts where the rules of evidence and the procedures of the courts pertain, when the subject matter is labeling and they are in the Federal Trade Commission where the administrative process which is being discussed pertains when their advertising is involved, and every so often the same subject matter is reflected in both media.

Now, this bill presents two situations in which the clarification of the intent of Congress is much needed. The first proposition is, does, or did, Congress intend that actual controversies of fact and law be tried and adjudicated by the Commission without effective court review; and second, did, or does, Congress intend that two agencies of the Government shall deal under different procedures with the same subject matter?

Now, I think that I may say with confidence, Mr. Chairman, that those two situations exist. I do not presume to say what Congress will do with them, but I do presume to say that they are situations with which the Congress ought to deal and to which this bill is addressed. Let me first speak of the one which has already been under consideration here today and that is the one dealing with the administrative procedure.

I think that this is a good place to say that what may be the situation in other statutes and what may be indicated as a corrective action in procedures of other agencies should not influence what is done with this proposed amendment to the Federal Trade Commission. Many Federal agencies, and of course there are many, have various and different functions one from another. Many are engaged to a large extent in what is called rule making, in the formulation of standards which are applicable to a whole class, in the shaping of regulations which may apply equally and uniformly throughout a class.

Now, of course one form of review may be indicated when you are dealing with that sort of function, whereas an entirely different form of review is due when you are dealing with another function, to wit, an adjudicating function.

Now, where Congress delegates a legislative function to an agency, I shall be the first to say that the same form of court review should not be applied to that as I will say to you today should be applied where Congress has delegated an adjudicating function. We are discussing here today—as we talk about the Federal Trade Commission procedure, and as we talk only about that, and do not get into

the fields of the other agencies—controversies between the Government and the citizen involving specific issues of fact and the application of the law to the determination of these facts. We are dealing with cases which affect the property rights of citizens, which affect the course of their business. I can illustrate by calling your attention to some cases which have been mentioned today.

In the *Siegal* case (*Siegal v. The Federal Trade Commission*, 150 Fed. 2d; 751, certiorari granted January 2, 1946) the subject matter was a trade-mark, "Alpacuna." That trade-mark had been used since 1920 by the company. The Commission ordered it to cease using its trade-mark.

In the *Herzfeld* case (140 Fed. 207), the question was whether or not the corporation could use the word "Mills" as a part of its name. The Commission held that it could not and the court said that it could not alter the Commission's judgment, although this company in one way or another did have contractual relations with mills in different parts of the world. Yet it was denied the right to use the word "Mills" as part of its corporate name.

In the *A. P. W. Paper Company v. The Federal Trade Commission* in the Federal second circuit, the trade-mark involved is "Red Cross," the words and the cross, used by that company since 1905.

Now, I could carry that on. I just mentioned those to indicate to you that the sort of things that are adjudicated here are such as trade-marks, advertisements, practices, and methods of doing business.

Now, I say to you that when these things are adjudicated by an administrative agency, there should be an effective judicial review just as though they had been adjudicated in a lower court. And that is precisely what this first amendment is about—shall there be an appeal and if so shall there be an effective review? As the statute stands today there is really no practical review. The review which is provided in the act is only that minimum of review which is accorded to the review of a regulation or legislative function. If you talk of reviewing facts but mean reviewing only to see whether there was some evidence—call it "substantial evidence" if you prefer—such substantial evidence to support the facts, that is simply reviewing to see whether the agency has acted in accordance with law, because if the agency has not had facts to support its findings in the sense in which that phrase is used, then it has acted arbitrarily and capriciously, and that is not in accordance with law.

Now, if we grant that there should be an appeal from the Commission's adjudications, and proceed to ask what sort of appeal there should be, this bill answers that there should be a review of the facts and a review of the remedy, and I advance the following considerations in behalf of that position:

First, there is now no assurance that issues of facts are determined by the weight of the evidence. The Commission may say that when it decides a case it weighs the evidence and decides on the basis of the preponderance of the evidence. Well, I am not going to have any personal dispute with any of my friends of the Commission about that, I am simply going to say to you that there is nothing in this act as it now stands which compels the Commission to decide a case in the first instance by the preponderance of the evidence. There is

nothing here that compels it, and there is nothing that the respondent can do if he has reason to believe that it has not decided the case on that basis.

Mr. REECE. That is, the respondent in your opinion, is estopped from getting an effective appeal on that phase of the case.

Mr. HOGG. Yes, indeed; because when he goes up the only thing that the court may look for is to see whether there is, in the words of the act, "any evidence to support it," and in the words of the interpretations by the courts, "any substantial evidence to support." They cannot look to see whether the weight is on the side of the facts.

Mr. RABIN. I did not want to interrupt you, but at the time of the initial hearing, you said that there is nothing to indicate whether the Commission decided in accordance with the preponderance of the evidence. How then would the Commission decide? I can understand where one with a restraining order against him may think that they did not decide correctly, but it seems to me that the standard that they may use can only be that. Do you know of any other standard?

Mr. HOGG. Yes, sir; that ought to be the only standard, but all they have to do is comply with the statute. The statute is tested by the review, so that all that they have to do is to meet the test which is statutorily laid as evidence in support of what they do.

Mr. RABIN. That is so far as review is concerned; but I mean the Commission itself, what standard does it apply?

Mr. HOGG. The Commission says that it applies the preponderance rule, but I say to you that there is nothing in the act which requires it and no way in which the respondent can compel it.

Mr. RABIN. I can understand the argument that the respondent cannot review it; I can understand that; but it seems to me that that would be the only standard for the Commission to use in its initial decision—the preponderance of evidence. A particular respondent may not understand that they decided it correctly, but it seems to me that that is the only standard that they can use.

Mr. HOGG. It is the only standard that they should use.

Mr. RABIN. Yes, sir.

Mr. REECE. Recently someone sent me a copy of an address which was delivered by Judge Martin, a very distinguished jurist in Memphis, who is a member of the Sixth Circuit Court of Appeals. I think before the Bar Association in New York. Were you present when that speech was delivered or have you seen it?

Mr. HOGG. I have seen it, Mr. Reece, and I have it here. It is in the American Bar Association Journal.

Mr. REECE. He seemed to deal rather effectively with that subject.

Mr. HOGG. He makes very emphatic references to the situation which exists. It is on the question of review, Mr. Chairman, which I would make as a second observation here in behalf of this bill, that when you come to the review there is no weighing of the evidence permitted by the courts. Now I would like to call your attention to what Judge Martin said, and he was not talking of the Federal Trade Commission, he was talking of agencies in general.

Mr. RABIN. I do not want you to assume from what I have stated that I am opposed to an adequate or full review by the circuit court in accordance with the terms of this bill, I express no opinion on it.

Mr. HOGE. I do not understand that you did, sir, and I am glad to have any question that comes to your mind.

Judge Martin is the circuit judge, one of the circuit judges on the Sixth Circuit, and he was addressing a judicial conference for the Sixth Circuit, on October 18, 1945. His address was in the *Journal of the American Bar Association* for December 1945, and the point I would like to call your attention to appears on page 625. He says this, and I repeat he is speaking of agencies in general, and I adduce it only as applicable to the one that we are talking about.

Judge Martin said:

No more startling innovation has come about within the past decade than the widespread building up of administrative tribunals in derogation of the judicial power, which some of us have thought was firmly vested by the Constitution in the courts alone. So frequently have we been reminded of our inferiority in expertness to various administrative boards and agencies exercising more than quasi-judicial powers but still subject to our review upon petitions for enforcement of their orders, that some fortitude on the part of a circuit judge is necessary for avoidance of an inferiority complex. So steadily has our power of independent decision been curtailed by acts of Congress and interpretative opinions of the Supreme Court that we sometimes wonder whether we are considered inferior courts in an actual as well as in the comparative sense of the word "inferior" as used in the Constitution.

Our practical function in the review of rulings of administrative boards has been reduced to reading records for possible discovery of that rare case wherein there is no evidence however slight from which the board could reasonably have drawn inferences upon which a finding of fact was based.

I will skip a little more of it, but I do want to call this next passage to your attention because it seems to me a very significant one:

To my thinking it is not in the public interest that the seal of a United States circuit court of appeals should by compulsion become a rubber stamp for the approval of the all too often arbitrary action of an administrative agency. Unless through acts of Congress the people restore to the United States circuit courts of appeal a modicum of their former significance in the scheme of national government, their present partial eclipse may soon become total. A fair appraisal of the record of these intermediate appellate tribunals would impel the conclusion that they deserve a higher degree of faith in their intelligence, efficiency, and expertness in the administration of justice than has been evinced in the gradual divestiture of their right to reason and to render judgment with appropriate independence.

Now, that is a circuit judge describing the situation as it exists. I do not think that there is any dispute really that the circuit courts are not permitted to weigh the evidence, because the Supreme Court has said it a number of times, the circuit courts are saying it with increasing frequency, and the Commission itself says it.

I would like to call your attention to something that the Commission says, as indicating from that authority, from the Commission itself, as to just what the situation is on appeal. I am going to read just one or two lines from the brief of the Commission in the Siegal case, referred to a moment ago. That is the case of *Jacob Siegal v. The Federal Trade Commission* in the Third Circuit. I am looking at pages 50, 51, and 52 of that brief, but I am quoting only portions from those pages.

The brief says this:

Section 5 of the Federal Trade Commission Act inter alia states that "the findings of the Commission as to the facts if supported by evidence shall be conclusive" (52 Stat. 113; 15 U. S. C. A. sec. 45 (c)). It is now Hornbook law that when the evidence in such matter is in a field of controversy, the weighing thereof is solely for the commission.

They cite cases, from one of which they quote, the *Lighthouse Rug Company v. The Federal Trade Commission* (35 Fed. 2d, 163), the court saying:

There was substantial evidence to the contrary offered by petitioner and if the finding of the Commission had been to the contrary such finding likewise would have been conclusive upon this court.

Then they quote from Judge Hand in *Moretrench Corp. v. Federal Trade Commission* (127 Fed. 2d), where Judge Hand says this:

On the record we doubt whether we should have concluded that the "disparaging" statements were misleading but since our office ends as soon as we find substantial support for the finding, this part of the order must also be affirmed.

The brief continues:

- And yet again, said he, "As this was the only part found to have been false, it is again hard to imagine how anyone reading it could have understood it as more than puffing. Yet for the reasons we have just given, if the Commission saw fit to take notice of it, we may not interfere."

That ends the quotation.

Now, Mr. Chairman, I will not take your time to cite more of these authorities, there are any number of citations which establish conclusively that there is no power in the court to weigh the evidence.

Mr. REECE. Mr. Chairman, in correcting his remarks, I presume it will be all right if he wishes to embody some of those citations in his remarks as a part of the record. That would save time.

Mr. HOGE. I would be very glad to do that, sir.

Mr. RABIN. You may do that.

Mr. REECE. I think that that would be helpful.

Mr. RABIN. That question is not in dispute, that is all right.

Mr. HOGE. I do not think that there is any dispute about that, Mr. Chairman. I would like to have in this record a copy of the opinion of the Third Circuit in the Siegal case which has been referred to, because there Judge McLaughlin did review many of the recent cases. It was of the impotency of the court to modify the remedy he was talking of so much there. I would like to have that as a part, if I may, in extension of these remarks.

(The matter referred to appears at the close of Mr. Hoge's remarks. See p. 73.)

Mr. RABIN. There is no dispute on that point, is there? The question is one of policy, whether we should continue that method of review.

Mr. HOGE. I think that that is what it comes down to, whether we should continue what seems to be an admitted position, the helplessness of the courts at the present time.

Now, I want to say this to you, as bearing upon the policy: The immunity which this Commission enjoys is a greater immunity than the district courts of our land enjoys when trying the same sort of cases.

When trying these labeling cases, for instance, under the Food and Drug Act, or when trying other cases that involve deceit and unfairness and fraud and unfair trade practices, the Federal district courts do not have the immunity to review that this Commission has. The courts are dealt with by the rules of civil procedure, rule 52 (a), and I want to call your attention to a part of that rule which applies to

the trial of cases in the Federal courts by the judges without juries. The rule is this, at that point :

Findings of fact shall not be set aside unless clearly erroneous, and due regard should be given to the opportunity of the trial court to judge of the credibility of the witnesses.

The notes of the Advisory Committee on the Rules say that this rule accords with the decisions on the scope of the review in modern Federal equity practice, and the Federal equity practice is that the judge's findings as to the facts may be set aside when contrary to the clear weight of the evidence.

In that case the courts do weigh the evidence and if they find that the findings are contrary to the clear weight of the evidence, they are reversed. One case has drawn attention to what we are talking of here in these words. I am quoting from *Guilford Construction Company v. Biggs* (102 Fed. 2d, 46) :

A finding of fact is "clearly erroneous" if it is against the clear weight of the evidence, and it does not suffice that it be supported by evidence.

Likewise I would like to draw your attention to the fact that the review of the remedy which is proposed by this bill—the power of the court as this bill would have it to modify the remedy as to the court seems proper in the circumstances of the case—coincides with the power of the court, the appeal court, to review the order of the district court. I will give you a case on that, *Thorpe v. The National City Bank* (274 Fed. 200).

Mr. RABIN. May I ask a question in this respect; is it not true that it does not follow that if the higher court would have decided the other way, if it sat as an original court, it must necessarily reverse? The clear weight of evidence is more than that. It is greater than a difference of opinion.

Mr. HOGE. I think that you are right about that; yes, sir, I agree with that.

Now, in this case which I have just named, or just cited, speaking of the power of the circuit courts to review the orders of the district court, the language reads very closely upon this amendment: The circuit court of appeals—

has power to affirm, modify, or reverse any judgment lawfully brought before it for review, or to direct such judgment to be rendered, or further proceedings to be had, as the justice of the case may require.

Next I would like to observe that the Commission is not in the same position as the trial judge. It is a mistake in our thinking of review to put the Commission either in the place of the jury, which, of course, even the trial judge is not, or in place of the trial judge who sees the witnesses. You will remember that rule 52 (a), which I read to you, says that due regard should be had to the court's opportunity to observe the witnesses—"to judge of the credibility of the witnesses."

Now, of course, it is Hornbook law as to the importance of the observation of the witnesses in the determination of the issue.

The courts have said, and I will cite on that the case of *State Farm Mutual Automobile Insurance Co. v. Bonacci* (111 Fed. 2d, 412) :

The facts largely relied upon in this case consist of testimony and written statements given or made by the defendants not in the presence of the lower court but in the course of the trial of the damage actions in the State court. The lower court, as to such evidence, had no better opportunity of judging the credibility of the witnesses than does the appellate court.

The next point is a subject which has been mentioned here this morning, and I will just mention it without going all over it again. The Commission combines the diverse functions of adjudication, and that is very important in determining whether the present policy as to court review should be continued or not. It is the complainant, it is the prosecutor, it is the jury, it is the judge, all rolled into one.

There is another matter I would like to comment upon that has a bearing upon this policy and a very real bearing as it applies to the Federal Trade Commission, and that is this: The Commission's adjudicating power has been greatly enlarged. It may be said, why do we disturb this practice which has gone on for a number of years, that has attained a position of respect by its antiquity? That is not the situation. When we determine whether this policy should be continued or not we must view this policy not in the light of 1914, when the Federal Trade Commission Act was passed, but in the light of 1938 and afterwards, when the Federal Trade Commission Act was substantially amended.

Just let me call your attention to two or three things on that score. Prior to 1938 the Federal Trade Commission orders could not be enforced except upon petition to the circuit courts of appeal. The Federal Trade Commission could enter an order to cease and desist and the respondent could ignore that order with impunity, for just as long as the Commission did not disturb him. The Commission had no way of enforcing it. The Commission had to file a petition with the circuit courts asking that the order be enforced by the court, and at that time the respondent might bring to the order any attack which he had. He did not have much, perhaps, but at that time he could bring what he had and he was not prejudiced by the delay.

That situation was radically changed in 1938 by a provision, an amendment to the act, whereby the cease-and-desist order now becomes final in a certain number of days after the entry of the order if you do not appeal, and if you do appeal then in a certain number of days after the conclusion of that.

That cease-and-desist order when it becomes final is what might be called self-executing. That is to say, if you violate it you are then subject to civil-penalty action for a forfeit of \$5,000 for each violation of the order. The only question presented then is whether or not there has been a violation. At that time one cannot even inquire whether there was evidence to support it, regardless of how much evidence.

Now, I say that makes a very different situation in this act as we view it today.

There is another thing which should be borne in mind if we consider whether we are to continue the policy of the years in the light of 1938 amendments. Prior to 1938, the Commission's jurisdiction in the particulars that we are speaking of was to prevent unfair methods of competition in commerce.

That may have been a phrase of some expansion but it also had some limitations. The section was amended to provide that the Commission may prevent, or was empowered to prevent, unfair methods of competition in commerce and unfair or deceptive acts or practices.

There are no limits to that expansion. You are not bound by competition. It is "unfair acts and practices" in commerce. Therefore,

the Commission's jurisdiction in which it has this freedom from review is a vastly larger thing than it was in 1914 when the act was first written.

And, as I shall discuss with you in just a moment, the Commission's jurisdiction was still more extended by enlarging its powers with respect to the advertisements of foods, drugs, cosmetics, and therapeutic devices. That leads into the other situation which I mentioned at the outset which so sorely needs the attention of Congress.

In 1938 there were passed two laws, one was the Federal Food, Drug, and Cosmetic Act and the other was the Lea Act, amending the Federal Trade Commission Act in the respect which I have just mentioned and also to enlarge its powers with respect to false advertising of these products.

When the food and drug bills were proposed in 1933 and over the years until 1938, they all included provisions dealing with the advertising, not only the composition and the labeling but also the advertising. The Federal Trade Commission took the position that it had exercised jurisdiction over the advertisements of foods, drugs, and cosmetics as a part of its jurisdiction to deal with unfair methods of competition. That was quite true, of course. It had so exercised jurisdiction. The Commission said that its jurisdiction in this respect should not be taken from it and given to the Food and Drug Administration, but if you were going to do anything its jurisdiction should be strengthened. That was the solution which came out of this very committee in 1938. The food and drug bill was stripped of its references to advertising and the Federal Trade Commission Act had several new sections added.

There was a section added which provided a criminal penalty for advertising which was dangerous to health in its falsity or which was willful. That power is to be exercised by prosecutions in the court. There was an injunction provision added to permit the Commission to seek an injunction in the courts against advertising which was dangerous in its falsity pending the outcome of the Commission's proceeding.

We do not need to take any time with the criminal phase and the injunction phase. The principal thing that was done was that a definition of false advertising was prescribed, and this bill seeks to amend that definition. It was intended, we thought, in 1938, that there was to be no conflict between the Food and Drug Act and the Federal Trade Commission Act in this respect. The reports from this committee certainly seem to indicate that, and I rather think that that is a presumption which we can indulge in, that this committee did not intend any conflict. And so, the definition of false advertising which was written into the Federal Trade Commission Act excluded labeling.

The definition read like this, and it is section 15 (a) of the act—

The term "false advertisement" means an advertisement, other than labeling, which is misleading in a material respect; and in determining whether any advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual.

There is a little more to the definition than that, but that is all that is involved here and that is necessary to the discussion.

Now, any advertisement of these four products, foods, drugs, devices, or cosmetics which are false as so defined are declared to be unfair acts and practices in commerce and subject to the Commission's administrative procedure under section 5. The result has been that we have two agencies dealing with the same subject matter. When that subject matter appears in the labeling we are in the courts under the Food and Drug Act, and when it appears in the advertising we are in the Federal Trade Commission under the Federal Trade Commission procedures. If that were all there was to this, the situation would not be as serious. That has certain disturbing factors, because, for one thing, we are running into questions of res adjudicata between these two agencies. We have the Food and Drug Administration proceeding in the courts and the courts being estopped by a Federal Trade Commission order in the same circumstances (*U. S. v. Willard Tablet Co.*, 141 Fed. (2) 141, C. C. A. 7).

The more serious aspect, however, is that the Commission has proceeded to deal with the labeling of these products, so that we have the Commission and the Food and Drug Administration both dealing with the labeling. They have done that largely through a general clause in section 15 (a) which this bill proposes to strike out. That is the clause which reads—

material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement or under such conditions as are customary or usual.

Now, that provision or that clause which this bill proposes to strike out has been used by the Commission as though it were a requirement for warnings of a directional nature in the advertisements. I submit to you that this section 15 (a) was for the purpose of encompassing an advertisement which may be false by virtue of its affirmative statements or by virtue of its omissions; that you could walk all the way around it to see whether it was false by its silence or whether it was false by its expression or both. I submit to you that this section when it was written was never intended to be authority for the Commission to proceed to require either warnings in the advertisements or warnings in the labeling.

Here is the way the thing is working: When I say "warnings" let me make it clear—it should not be confused—I am not speaking of cases in which there may be a dangerous drug. I am not speaking of some warning which flags the drug as being per se dangerous. I am speaking of, and the Commission has been dealing with, warnings which are of a directional nature; warnings that the product should not be used excessively, that the product should be used in given circumstances, that the product should not be used in stated pathological conditions.

Now, the Food and Drug Act does deal with that subject and the act deals with it expressly. Section 502 (f) of the Federal Food, Drug and Cosmetic Act has a particular provision for that. It is:

A drug shall be deemed to be misbranded unless its labeling bears (1) adequate directions for use; and (2) such adequate warnings against use in those pathological conditions or by children where its use may be dangerous to health, or against unsafe dosage or methods or duration of administration or application, in such manner and form, as are necessary for the protection of the users.

Mr. Chairman, that is an express requirement of the Food and Drug Act. There is no comparable provision in the Federal Trade Commission Act. But under the guise of regulating advertising, the Commission has presumed to insist upon the nature and the language of the warnings which must appear upon the packages of these products on the penalty that if one does not put it on the package as the Commission wants it he must put it in the advertising. So, indirectly the Commission has exercised and does exercise control over the labeling.

Now, Congress is the only place where this can be straightened out. This is where it started. This is where the two acts came from. Now, the fact is that the situation exists. There is no question about that. I was looking here a moment ago at some stipulations and orders. If you were under the impression that they deal with dangerous drugs, arsenic and poisons, and so forth, you would be under a misapprehension. These orders deal with such things as headache and cold remedies, nose drops, tonics, ointments, laxatives. The laxative warnings are something such as this:

There is potential danger in its use in cases when abdominal pain (stomach-ache, cramps, colic) nausea, vomiting (stomach sickness), or other symptoms of appendicitis are present, and that frequent or continued use of this preparation may result in dependence on laxatives.

Well, as I tell you, that is a matter of direction which this committee took care of in the Food and Drug Act and which the Food and Drug Administration takes care of on every drug that is sold in interstate commerce. And the Federal Food and Drug Administration is a highly competent Federal agency, diligent in the enforcement of its statute.

Now, as I said to you the situation does exist. It is going on. The courts have held that the Commission does have jurisdiction over the labeling of these products. That has been held in several cases, I will give you a citation of two or three of them. One of them is the *Fresh Grown Preserves Corp. v. Federal Trade Commission* (125 Fed. (2d), 917, C. C. A. (2d), 1942). Another is *Rigaud v. Federal Trade Commission* (125 Fed. (2d) 590). Another is *Charles of the Ritz Distribution Corp. v. Federal Trade Commission* (143 Fed. (2d) 676).

The Federal Trade Commission is under the impression apparently that it has this power because it is exercising it. I would like to read you a quotation from one of the Commission's own briefs. They say that the limitation written into section 15 (a) was not intended to deprive them of jurisdiction over the labeling. The Commission's brief (pp. 27-39) in *Dearborn Supply Co.* against the Federal Trade Commission in the Seventh Circuit, said this:

The contention that the Commission has no jurisdiction over labeling is based on the provision of section 15 of the Federal Trade Commission Act, which, for the purposes of sections 12, 13, and 14, excludes "labeling" from the statute's definition of a "false advertisement" of foods, drugs, and cosmetics. *This exclusion, we think, was intended to apply only in proceedings under sections 13 and 14 of the statute, to enjoin or criminally prosecute the dissemination of false advertisements in violation of section 12, and was not intended as a limitation upon the Commission's jurisdiction to suppress false labeling by an administrative order to cease and desist.* [Italics mine.]

I call your attention to that. They say this inclusion was intended to apply only in proceedings under sections 13 and 14, the criminal and injunction proceedings, although section 16 says "for the purposes

of sections 12, 13, and 14," this definition of false advertisement shall exclude labeling.

Mr. Chairman, I am not sure that this bill and the amendments which it proposes at this point are sufficient to overcome all of the difficulty that is existing. I will say this, that it will go a long ways toward overcoming it, because by taking out the reference to warnings, you will remove the only shred of authority for an excursion into the field of therapeutics on every advertising case which a study of warnings involves.

It is one thing to say whether an advertisement is false or misleading. That may involve therapeutics to an extent, yes, but you cannot possibly deal with the indications for using a drug and the contraindications without getting deep into the field of therapeutics. And as soon as you do then you are in a field which the other agency of Government has been in for years under the comprehensive Federal Food, Drug, and Cosmetic Act.

I would like to refer to the last amendment to this bill:

Sec. 19. Food, drugs, devices, and cosmetics shall be exempt from the provisions of this act to the extent of the application or the extension thereto of the Federal Food, Drug, and Cosmetic Act, approved June 25, 1938, as amended.

It seems to me that would take foods, drugs, and cosmetics out from under the Federal Trade Commission Act insofar as the Food and Drug Act applies to them. That ought to take them out in every respect except on the simple advertising question which I believe this committee originally intended was what the Commission should have and all that the Commission should have. I submit to you that it is an appropriate thing to exempt these products from this act when they are subject to a dominant comprehensive act. That is in keeping with the policy which the Congress has held for years, and this committee in particular, and a policy which is expressed in the Federal Trade Commission Act itself.

For instance, the packers are not subject to the Commission Act, and the Civil Aeronautics Act which was recently passed takes those subject to that act out from under the Federal Trade Commission Act. The simple logic of it is that if Congress has seen fit to impose a full and comprehensive pattern of regulation for the food, drug, and cosmetic industries under one act with one body enforcing it, it ought not empower or tolerate another agency of the Government shopping over the same territory.

Mr. RABIN. Let me ask you, do you say that the Food, Drug, and Cosmetic Act confers jurisdiction over false advertising aside from labeling?

Mr. HOGE. No, sir; it does not.

Mr. RABIN. If this were enacted, would it take away the jurisdiction of the Federal Trade Commission with respect to false advertising for foods, drugs, and cosmetics?

Mr. HOGE. No, sir; it would not, because, you see, the Food, Drug, and Cosmetic Act does not deal with false advertising.

Mr. RABIN. But it would merely take the labeling provision out?

Mr. HOGE. Yes, sir; it would take the labeling provisions completely away from the jurisdiction of the Federal Trade Commission as far as these four products are concerned.

Mr. REECE. The proposed amendment to which you refer probably ought to be repeated again by way of emphasis. In exempting foods, drugs, cosmetics, it provides "these items shall be exempt from the provisions of this act to the extent of the application or the extension thereto of the Federal Food, Drug, and Cosmetics Act." Thus when you make sure that there would be no gap that would be uncovered—

Mr. HOGE. That is right.

Mr. REECE. In your statement. But the amendments were proposed with a view to overcoming the overlapping jurisdiction, and, I might, if the witness will pardon me, deviate here to say that as a member of the subcommittee dealing with food and drugs, Mr. Chairman, and the subcommittee dealing with the advertising provisions under the Wheeler-Lea Act, it is my recollection that the committees took great pains to try to prevent overlapping of the jurisdiction.

There was a very keen interest, we might also say an anxiety on the part of some, for fear there would be an overlapping of jurisdiction, that the whole subject should go over to the Pure Food and Drug Administration.

And in the Congress previous to the drawing up of the Wheeler-Lea Act, which resolved the question, as a member of the subcommittee drafting the pure food and drug bill, if I may be pardoned for saying so, I am the one that made the point, so to speak, to give jurisdiction over advertising to the Federal Trade Commission for the reasons set out by the witness here that heretofore it had had general jurisdiction over advertising. It was our thought when it was resolved in the manner that it was resolved, that the danger of overlapping jurisdiction had been avoided and that labeling remained solely under the jurisdiction of the Pure Food and Drug Administration, and for good reasons because that was the Administration that had grown up in dealing with that subject for the purpose of protecting the health of the people and had scientific and technical staffs capable of so protecting the public.

And I hope you will pardon me, for I am merely stating this for my own satisfaction, and, for one, I was very much disappointed when this conflict in jurisdiction arose.

The witness has recited some of the cases, but there are cases of record, Mr. Chairman, where the Federal Trade Commission had dealt with a particular labeling, in a particular case, and reached a conclusion, the Food and Drug dealt with the same case and reached a different conclusion, and vice versa, and in each case the court took cognizance of the previous action by another governmental body on the same subject matter. It became clear to me that was an unwise situation as well as one that was unfortunate, both from the standpoint of protection to the public and the standpoint of the litigants that might be concerned in the proceedings between the two bodies. So well do I recall that it was that phase of the case then, Mr. Campbell, Director of Pure Food and Drug Administration, and later his successor, Dr. Dunbar, who then, I believe, was his assistant, were concerned with when this matter was up. All parties, as I recall, who were concerned when this matter was under consideration, reached the conclusion that the possibility of conflict had been removed, and it was so stated in the report of the committee, and so

stated by the chairman, the now chairman—then chairman of the subcommittee, in his address to the Congress.

And for one, after the conflict arose, having had some part in bringing about the situation, Mr. Chairman, that resulted in the conflict, I felt some responsibility to all parties concerned, to undertake to clarify, to be of assistance in clarifying, and to remove the conflict if possible.

And I want to beg the committee's pardon as well as the pardon of the witness, in stating this, but I am stating my views on this subject because I have felt a responsibility that I have not been very happy about. That phase of the situation is responsible for my interest in introducing this bill in the first instance.

And then when I went into the subject, I branched out and included other aspects of the case.

And in presenting the bill and in any consideration that has been given it, it has not been my purpose, and I am sure not the purpose of the committee, and I feel, not the purpose of any of the witnesses to reflect upon the administration of the Federal Trade Commission, because I have the highest regard for that body, and the important position which it holds and I hope that no one will construe the position that anyone might take on this particular legislation as in anywise indicating a lack of confidence in this estimable agency of the Government, nor of its personnel, because, so far as I am personally concerned, all of the personnel whom I know are my friends, and I consider the Commission my friend, and those considerations are entirely outside of the purview of the matter that is before us.

I again beg your pardon.

Mr. HOGE. I am awfully glad Mr. Reece said that. Might you just permit me apropos of what he said to say this, too, as Mr. Reece remembers, I was before this committee in those years when these two laws were being worked out. I gave a great deal of my thought to the laws then. I have given a great deal of my thought and time to them since.

I like to think that I have given a great deal of my life to these laws and that I have a very deep and abiding interest in strong and effective food, drug, and cosmetic legislation in the United States.

I think that the finest thing that ever happened for the manufacturers in this line of business was when the Food and Drug Act, that fine, comprehensive law of 1938, was passed.

There is no difference ultimately between the interests of the consumer and the interests of the manufacturer. And any law which insists upon that standard and enforces it is a fine law. But the situation that has developed is not in the public interest. This situation is not what you gentlemen intended, as Mr. Reece has just said.

We all know that was not intended and I speak just as you did, Mr. Reece, without any animus whatsoever as respects any member of the Federal Trade Commission or its staff. I have the utmost respect for those gentlemen, and I like to think of all of them as personal friends. I am not speaking of individuals. I am speaking of laws here this afternoon and systems under laws, and policies, Mr. Chairman, of the Congress in the formulating of laws.

And what we intended in 1938 has not been realized.

Confusion does exist between these two agencies and the enforcement of these two laws.

I do not believe it can be seriously disputed. And I say to you that it is a matter which the Congress ought—and I think the introduction of this bill, Mr. Reece, and the kind of attention that you gentlemen are giving us show the disposition of the Congress—to give attention to it.

I have no brief for the bill as it stands. If there are better ways of doing it, I should subscribe to any bill that will correct this situation.

And let me say one thing more. I hold no brief whatsoever for any license in the dissemination of false advertising. I am just as opposed to that as the Federal Trade Commission or any other person in this room. I ask no license for that, but I do ask to change the picture from what it is today, and I ask it, not only on behalf of business, but in the interest of the public.

MR. REECE. I would also, since I have referred to the Federal Trade Commission, likewise express my very great admiration for the manner in which the Food and Drug Administration has administered the authority which is vested in it.

There is no agency that rendered any higher service to the public or which has been, or is being, more ably administered; and there is no part of my service, during the 24 years that I have been on the Hill, in which I take greater pride than any small service I might have rendered in connection with the formulation and adoption of the Pure Food and Drug Act, and this other aspect over which the Federal Trade has jurisdiction, of course, along with that.

And my only purpose is to resolve it in the best way.

I had a letter from Dr. Dunbar, director of Pure Food and Drug Administration, which I would also like to make a part of the record for the consideration of the Congress.

(The matter previously referred to by Mr. Hoge is as follows:)

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 8407. October Term, 1943

JACOB SIEGEL COMPANY, PETITIONER, *v.* FEDERAL TRADE COMMISSION, RESPONDENT
PETITION TO REVIEW ORDER OF THE FEDERAL TRADE COMMISSION TO CEASE AND DESIST

Before BIGGS, JONES, and McLAUGHLIN, *Circuit Judges*

OPINION OF THE COURT

(150 Fed. 2d) 751, certiorari granted January 2, 1946)

(Filed November 30, 1944)

By McLAUGHLIN, *Circuit Judge*: The petitioner in this case has been manufacturing overcoats in the City of Philadelphia, Pa., for the last 30 years. In 1930 it developed a cloth for such coats consisting of a combination of alpaca, mohair, and wool fibers, on a cotton backing. This was inexpensive and designed for warmth and long wear. The purpose of adding the cotton was to obtain a denser face for the garment than possible with animal fibers alone. That same year the petitioner corporation gave the name "Alpacuna" to the coats. Within two years, the petitioner brought out a topcoat which it also called "Alpacuna." The topcoat had the same animal fibers as the overcoat but in order to make it lighter, the cotton backing was eliminated.

Among other things, the Federal Trade Commission found that the name "Alpacuna" is misleading and deceptive to a substantial portion of the purchasing public in that it represents or implies to such persons that the coats contain fiber

obtained from the animal known as the vicuna. The Commission ordered that the petitioner forthwith cease and desist from "using the word 'Alpacuna' or any other word which in whole or in part is indicative of the word vicuna to designate or describe respondent's coats; * * *" This language is the first part of Paragraph Six of the order. The first five paragraphs and the balance of the sixth paragraph are conceded by the petitioner and do not concern us. The issue has, therefore, been importantly narrowed and simplified.

There was a dissent in the Commission to the part of the order here disputed. It is very short and we quote it in full:

Commissioner Freer dissents from so much of the order as wholly prohibits the continued use of the trade name "Alpacuna" for the reason that this trade name, which has been in use for more than thirteen years, is a valuable business asset, and is neither deceptive per se, nor is the testimony concerning its tendency or capacity to deceive sufficiently clear and convincing as to render such prohibition of its use necessary in the public interest.

The only questions involved are: was there substantial evidence supporting the Commission's finding and whether the remedy provided was within its powers.

According to the petitioner's testimony, which was not contradicted, the name "Alpacuna" was created by its sales manager who used a fanciful variation of the word alpaca, which animal represented 50 percent of the wool fibers in the fabric. To alpaca the suffix "una" was added partly in order to obtain a word that was very easy to pronounce and partly to signify that the Siegel Company was the one manufacturer and the first to make the coat. The head of the Siegel Company testified that he did not have vicuna in mind at all in connection with the name "Alpacuna." He said further: "I was not familiar with it [vicuna] and I have been in business for 30 years and only in the last five years or six years I have heard of Vicuna. I was not interested in it. We never used it." It is undisputed that the vicuna is one of the rarest of animals. It is found principally in the high mountains of Peru and is of the llama family. In order to obtain its hair, the animal itself has to be killed. Such killing is regulated by law. Vicuna hair is one of the softest, finest animal fibers but has poor wearing qualities. Only a small amount of the fiber comes into the United States. The overcoats made from it, are valuable and run as high as \$900. The Alpacuna coats retail at \$40.

Strong testimony was presented supporting the petitioner's proposition that "Alpacuna" is a proper trade name for the particular coats and that the name does not represent to the public that the coats contain vicuna fiber. There was evidence of a poll taken in the particular section of a large New York department store where such coats were sold. Over 200 customers chosen at random were questioned and not one of them declared that the name "Alpacuna" indicated vicuna to them. There were numerous other witnesses, including: members of the public, reputable people in the clothing trade, department store specialists in protecting customers, a representative of clothing workers, a textile expert, etc. A person connected with the National Better Business Bureau stated he has never received a complaint regarding the name "Alpacuna." One of the functions of that organization is to receive complaints as to merchandise. The only person in the country who manufactures vicuna coats sent a letter to the Commission saying that he had no objection to the use of the name "Alpacuna" by petitioner. In addition to the direct defense testimony, some of the government witnesses supported the defense contention affirmatively by testimony to the effect that "Alpacuna" did not mean vicuna content to them; there were other government witnesses whose testimony was weak; and still others indicating prejudice or bias.

Petitioner also produced testimony tending to show that vicuna in connection with fabrics, denotes a soft finish cloth and argues that it is, therefore, properly applied to petitioner's coats. As to this, the same textile expert describes vicuna finish cloth as a soft finish fabric with no definite indication as to its fiber content. This was corroborated by other witnesses. Petitioner introduced some dictionary definitions defining vicuna wool as the wool of the vicuna or a mixture of wool and cotton used for soft fabrics. Petitioner strongly argues that its product is a vicuna cloth, with the dictionary definitions justifying any possible implication in the name "Alpacuna" with respect to vicuna.

Petitioner next stresses the point that vicuna animal fiber and its qualities are not generally known to the public. It calls attention to the admitted rarity of the animal. One expert for the Commission stated that it is almost extinct. It is suggested that because of the extremely limited quantity of vicuna fiber

available and because of its perishable quality, it would not be practical to attempt to combine it with alpaca from the standpoint of large-scale commercial manufacture. It is contended that the thought of the \$40 "Alpacuna" coat capitalizing on the term "vicuna" is farfetched since most of the potential customers do not have the least idea as to vicuna and the few who do, readily understand that a coat for large production and in the lower price field could not be produced from vicuna fiber.

In addition to the above, there are certain other important facts which appear. This proceeding was started in 1938 and in the original complaint there was no charge against the petitioner for using the name "Alpacuna." After answer had been filed to original complaint, settlement negotiations were entered into at the suggestion of counsel for the Commission and the Siegel Company executed and returned the stipulation for settlement drawn by the Commission's counsel. That settlement was not approved by the Commission and thereafter an amended complaint was filed which included the allegation regarding the use of the name "Alpacuna." A group of retail stores who handle the "Alpacuna" coats have filed a brief as *amicus curiae* in support of the petitioner's stand. Those stores set out that they have a very definite interest in the retention of the name by reason of cooperation in extensive advertising and selling the product over a period of years and that the barring the use of the name "Alpacuna" is a matter of serious detriment and direct prejudice to them.

There was also an array of witnesses on behalf of the Commission. The Director of the Bureau of Standards of one of New York's largest department stores said: "I take it this coat is made of a combination of alpaca and vicuna fibers." A person connected with a leading Philadelphia department store stated: "'Alpacuna' overcoats conveys to me Alpaca and Vicuna, a combination of alpaca and vicuna." A housekeeper on cross-examination stated she arrived at the impression that the garment was made of alpaca and vicuna as she said, "Well, from the name itself." The assistant director of the Washington Better Business Bureau testified to the same effect. A person who had actually sold the coats for five or six years was of the opinion that they contained alpaca and vicuna fibers. The only person testifying who had purchased an "Alpacuna" coat said that he was told at the time he bought it that the coat was made of * * * a vicuna wool-bearing South American animal." A number of other persons, including a construction engineer, housewives, a teacher, a physician, a publicity director of a Philadelphia department store, a director of merchandise research of another Philadelphia department store, a clothing salesman for a third Philadelphia department store, several people connected with various clothing houses and men's shops, all associated vicuna with the word "Alpacuna." Most of these witnesses gave their impression after examining one or more of the various Commission exhibits of advertising matter with reference to the coats.

The Commission vigorously disputed petitioner's proposition that vicuna does have an established secondary meaning. It produced dictionaries and encyclopedias in which pictures of the vicuna were shown and also various encyclopedias, dictionaries, and textile publications which do not include the secondary meaning of the word as asserted by the petitioner. Other evidence was produced tending to show that vicuna was known to a substantial portion of the public. For example, a letter from a principal of a textile high school in New York City was in evidence and stated that the school had a register of nearly 13,000 students, day and evening, with all of them taking a course in general textiles embracing knowledge of fibers obtained from goats, also sheep, vicuna, alpaca, etc. and that books dealing with the subject, and a wall chart showing pictures with samples of different fibers, vicuna, alpaca, etc. were used in the course. The letter concluded by stating: "I consider that it is part of general education under the head of commercial geography, textiles, and dressmaking for the average high school student to know something of alpaca and vicuna and other goat hairs—as well as sheep wool."

Obviously, from the above very brief outline of the evidence, the petitioner has made an impressive showing in its efforts to retain the name "Alpacuna." The Siegel Company is a well known and highly regarded concern and its coats have achieved considerable popularity in their own price range. They are widely publicized and large sums of money have been expended by the Siegel Company and various retail stores in merchandising them. The Siegel Company coined the name for the coats in 1930 and has been using it since that time. At this

time it is a valuable asset not only to the company but, as the amicus curiae brief points out, to certain retail establishments throughout the United States.

Just as obviously, it clearly appears that there is substantial evidence supporting the Commission's decision. Even counsel for the petitioner are forced to concede, as stated in their brief: "It is true that a number of witnesses called by trial counsel testified that the name 'Alpacuna' signified a vicuna animal fiber content." Upon the whole record the Commission made a finding that the name "Alpacuna" is misleading and deceptive to a substantial portion of the purchasing public in that it represents or implies to such persons that the coats contain fiber obtained from the animal known as vicuna. The likelihood of misleading the class of customers with which the petitioner generally deals seems slight but in view of the testimony that some of the purchasing public believes that "Alpacuna" implies vicuna content, we cannot say that the finding is not supported by substantial evidence or that the order to cease and desist from the use of the word "Alpacuna" which the Commission issued in consequence of the finding was without foundation. Even assuming that some of the testimony on behalf of the Commission was prejudiced or biased as contended, if the Commission wished to rely upon such testimony, we may not intervene whatever our thought. (*Segal v. Federal Trade Commission* (C. C. A. 2) 142 F. 2d 255.) With reference to the secondary meaning of vicuna or vicuna cloth, as said by Mr. Justice Cardozo in *Federal Trade Commission v. Algoma Co.* (291 U. S. 67 at 80):

The evidence here falls short of establishing two meanings with equal titles to legitimacy by force of common acceptance.

The Federal Trade Commission Act, Title 15, Section 45c, U. S. C. A. provides that:

The findings of the Commission as to the facts, if supported by evidence, shall be conclusive.

This means substantial evidence (*Federal Trade Commission v. Curtis Publishing Co.*, 260 U. S. 538 at 583; *Federal Security Administrator v. Quaker Oats*, 318 U. S. 218, 227, 228). The fact that there is a real conflict in the testimony with indeed substantial evidence by the petitioner contrary to the finding, does not change the situation, as this court cannot appraise testimony or pick and choose "for itself among uncertain and conflicting inferences therefrom." *Federal Trade Commission v. Algoma Co.*, supra. It is not necessary in order to sustain the Commission's finding that actual purchases must be made, with the buyer deceived by the name. It is enough if the name has both the capacity and tendency to deceive the ordinary purchaser. Potential injury is the test (*Federal Trade Commission v. Raladam Co.*, 316 U. S. 149, 152; *Federal Trade Commission v. Hires Turner Glass Co.*, 81 F. 2d, 362 (C. C. A. 3); *Jaffee v. Federal Trade Commission* (C. C. A. 7) 139 F. 2d 112). Absolving the petitioner from any deliberate effort to deceive does not affect the Commission's finding (*Federal Trade Commission v. Blaine* (C. C. A. 2 1928), 23 F. 2d 615, 621; certiorari denied 277 U. S. 598).

Although we sustain the Commission on its finding as to the name because of substantial evidence supporting that finding, we think strongly that the order is far too harsh. It destroys a widely and favorably known trade name, in existence for fourteen years. It causes serious injury to the petitioner and its retail outlets. The infraction, as the case now stands, is slight and could be cured by simple qualifying language. We could dispose of the problem by modifying the Commission's order as suggested, if the practice as outlined in *Federal Trade Commission v. Royal Milling Co.* (288 U. S. 212) and *Federal Trade Commission v. Hires Turner Glass Co.*, supra, a Third Circuit case, was still the law. While the Supreme Court has not dealt with the question of remedy in a Fair Trade Commission suit since the Royal Milling case, there have been a number of opinions from that court concerning remedies prescribed by the Labor Board. In those cases the court has forcibly pointed out that the matter of remedy is also for the administrative agency. In *Medo Corp. v. Labor Board* (221 U. S. 673), where the remedy ordered by the Labor Board was upheld, Chief Justice Stone for the court said in a footnote at pages 681 and 682:

¹ It has now long been settled that findings of the Board, as with those of other administrative agencies, are conclusive upon reviewing courts when supported by evidence, that the weighing of conflicting evidence is for the Board and not for the courts, that the inferences from the evidence are to be drawn by the Board and not by the courts, save only as questions of law are raised and that upon such questions of law, the experienced judg-

ment of the Board is entitled to great weight. (See *Franks Bros. Co. v. Labor Board*, post, p. 702; *Labor Board v. Southern Bell Co.*, 319 U. S. 50, 60, and cases cited; *Labor Board v. Nevada Copper Co.*, 316 U. S. 105, 106-107, and cases cited; "cf. *Dobson v. Commissioner*, 320 U. S. 489, 492, and cases cited.) [Italics ours.]

(See also *Dirie Pine v. Commissioner*, 320 U. S. 516 at 519; compare *Security Mills v. Commissioner*, 321 U. S. 281 at 286; and see cases collected in quotation from opinion in *Herzfeld v. Federal Trade Commission*, infra.)

The Second Circuit, which several times, on the authority of the Royal Milling decision, had modified orders of the Federal Trade Commission,¹ has now recognized this in a series of opinions commencing with *Herzfeld v. Federal Trade Commission* (140 F. 2d, 207), where Judge Learned Hand, for the court, said at page 20):

However, since *Federal Trade Commission v. Royal Milling Co.*, supra (288 U. S. 212, 53 S. Ct. 335, 77 L. Ed. 706), was decided, the Supreme Court has as much circumscribed our powers to review the decisions of administrative tribunals in point of remedy, as they have always been circumscribed in the review of facts. Such tribunals possess competence in their special fields which forbids us to disturb the measure of relief which they think necessary. In striking that balance between the conflicting interests involved which the remedy measures, they are for all practical purposes supreme. (*International Ass'n of Machinists v. National Labor Relations Board*, 311 U. S. 72, 82, 61 S. Ct. 83, 85 L. Ed. 50; *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U. S. 177, 198-200, 61 S. Ct. 845, 85 L. Ed. 1271, 133 A. L. R. 1217; *Virginia Electric & Power Co. v. National Labor Relations Board*, 319 U. S. 533, 541-543, 63 S. Ct. 1214, 88 L. Ed. 1568; *Williams Motor Co. v. National Labor Relations Board* (8 Cir. 128 F. 2d 960, 965). It is true that all these decisions concerned the Labor Board, but that tribunal does not enjoy a position of peculiar authority, as the court has indicated in other connections (*Gray v. Powell*, 314 U. S. 402, 412, 413, 62 S. Ct. 326, 86 L. Ed. 301; *Dobson v. Commissioner*, 320 U. S. 489, 64 S. Ct. 239; *Commissioner v. Heininger*, 320 U. S. 467, 64 S. Ct. 249). In controversies about trade-marks, and particularly about trade-names and make-up, the question is almost always one of degree; i. e., how far the chance of deception outweighs the inconvenience, or worse, to the merchant inevitable in compelling him to change his mark, his name, or his package. The decree marks the compromise which the court thinks adequate and necessary; it is the resultant of those unexpressed determinants which collectively we conceal under the term "discretion." We do not forget that from time immemorial this duty has been entrusted to courts, but that is irrelevant. Congress having now created an organ endowed with the skill which comes of long experience and penetrating study, its conclusions inevitably supersede those of courts, which are not similiary endowed.

That was followed by *Parke, Austin & Lipscomb v. Federal Trade Commission* (142 F. 2d 437), where Judge Chase said at pages 441 and 442:

The petitioners are standing upon much firmer ground when they insist that this paragraph in the order is needlessly severe in its sweeping requirement that the words "Smithsonian Institution" must be eliminated from the corporate name of petitioner Smithsonian Institute Series, Inc. There may well be some alternative remedy less drastic but adequately effective which might satisfy the requirements of fairness and should be adopted. On this record, however, we cannot be sure that the Commission has abused its discretion in this respect, and only in that event should we interfere with its action.

The late case of *Charles of the Ritz Distributors Corporation v. Federal Trade Commission* ((C. C. A. 2) 143 F. 2d 676), in the same court, with opinion by Judge Clark, is to the same effect. The question, in connection with another administrative agency, the Securities & Exchange Commission, has been before the First Circuit recently in *American Power & L. Co. v. Securities and Erchange Commission* (141 F. 2d 606), where Judge Magruder for the court said at page 619:

It is not enough that some other remedy, suggested by petitioners, might accomplish the statutory purposes in whole or in part. The choice of remedy

¹ *Bear Mill Mfg. Co. v. Federal Trade Commission* (C. C. A. 2), 98 F. 2d, 67; *Federal Trade Commission v. Cassoff* (C. C. A. 2), 38 F. 2d, 790; *Fluegelman & Co. v. Federal Trade Commission* (C. C. A. 2), 37 F. 2d, 59.

is a matter confided primarily to the expert judgment of the Commission, and in this field the courts are quite properly loath to set up their own judgment in opposition to that of the administrative tribunal.

It is evident, therefore, that the discretion as to the remedy in such controversy as this has now been vested in the Federal Trade Commission. That discretion has been exercised to totally prohibit the use of the name "Alpacuna" to the petitioner. Since the Commission has such power, we are unable, in view of the evidence, to say that the power has been abused in this instance, though under the same facts and circumstances, if we were still in control of the remedy, we would modify the order as above indicated.

Order affirmed.

A true copy:

Teste:

*Clerk of the United States Circuit Court of
Appeals for the Third Circuit.*

Mr. O'HARA. I just want to say that I hope we are dealing here with principles and with the common duty that all of us have, that any witness or any expression from any of the members of the committee, is certainly a God-given right; and I presume to go on doing just that so long as I am on the committee.

Mr. HOGE. Thank you, Mr. Chairman.

Mr. RABIN. I understand Mr. Liddy simply wants to submit some paper or document.

Mr. LIDDY. I wish to submit a memorandum in addition to my few remarks and try to summarize it in order to cut it down.

Mr. RABIN. I am very sorry, our presence is required on the floor at this time.

We will not be able to continue this afternoon. The requirements of the floor come first, as you understand. Our presence is immediately required on the floor of the House.

Mr. REECE. Was there any discussion whether we could meet in the morning? What I had in mind is that a great many of the people who are interested, as you can see, are here from out of town; travel is so difficult these days, if we could go ahead I think we should do so.

Mr. RABIN. We expect Mr. Lea out in just a few minutes.

Mr. O'HARA. There is a question whether we are going to adjourn to tomorrow morning.

Mr. RABIN. For the benefit of those who are from out of town and wish to stay over, the committee will meet again tomorrow at 10 o'clock, in this room.

(Whereupon, at 4 o'clock p. m., Tuesday, January 29, 1946, the committee adjourned to reconvene Wednesday, January 30, 1946, in the same room.)

AMEND FEDERAL TRADE COMMISSION ACT

WEDNESDAY, JANUARY 30, 1946

HOUSE OF REPRESENTATIVES,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE.

Washington, D. C.

The committee met at 10 a. m., Hon. Benjamin J. Rabin presiding.

Mr. RABIN. We continue this morning with the consideration of H. R. 2390. Mr. Hugo Mock. Are you ready to proceed, Mr. Mock?

Mr. MOCK. Yes, sir; my remarks will be very brief.

Mr. RABIN. Very well.

STATEMENT OF HUGO MOCK, REPRESENTING THE TOILET GOODS ASSOCIATION

Mr. Mock. My name is Hugo Mock; I represent the Toilet Goods Association, which represents the bulk of the toilet goods industry. I am here as their representative, and also in my individual capacity as an attorney.

May I say at the beginning that I was very much gratified yesterday at the unusual approach made by Mr. Murphy, of the Advertising Federation, in which he said that the Federal Trade Commission was not on trial and was not a defendant. That point of view was particularly emphasized by Mr. Reece himself, and I think it is very important to keep to that point of view and not to consider in this case the Federal Trade Commission a defendant.

I am not here to eulogize the Commission; it has been working since 1914 on the initiative supplied by Woodrow Wilson, and Justice Brandeis. It has during that time, I might say, been the conscience of American business, and to use a phrase of Voltaire—I do not wish to be irreverent, but I think when Voltaire said, "If we didn't have God, we would have to invent one," if we didn't have the Federal Trade Commission, we would have to invent it, because we needed that kind of an agency for American business.

That being the case, however, I think we are entitled, all of us, to be considered as partners in this enterprise, and I think I may go so far as to say we are entitled to the cooperation of the Commission itself in correcting such errors as we may find, especially of a procedural nature.

It must be remembered that from the very foundation of the Commission, and its intended jurisdiction, it was meant to cover practically the whole field of industrial activity, and that has been the source of its merits, and also of some of the defects of its operation. Much of its technique had to be improvised, and despite the splendid job it

has done in many fields, it has been impossible to find specialists in all fields in which it operates.

The Interstate Commerce Commission has been frequently mentioned here, but that Commission has worked exclusively with the railroads, and when the Commission, after hearings, has ordered specific freight rates for specific commodities in specific territories, such decisions have been made by specialists who have confined themselves to that particular field, and necessarily a court of review of the decisions of the Interstate Commerce Commission in the field of freight rates would have difficulty in bringing to that consideration the same amount of experience and time which motivated the original decision.

I submit that such a background is not possible in the hundreds of cases in all fields brought before the Commission, and, not only that, in practice it has been found necessary within the Commission itself to divide specific cases into segments so that no one within the Commission has a specialized acquaintance with a particular case or with a particular industry.

There is the *modus operandi*. If a certain set of facts is brought to the attention of the Federal Trade Commission, it is investigated by one attorney who, as soon as he reports to the Complaint Bureau, that particular attorney is through with the case. He is not consulted any more. The complaint is drafted by the Complaint Bureau, and then a trial attorney is appointed and hearings are had. The trial attorney makes his findings and recommendation and finally the case is heard before the members of the Federal Trade Commission, sitting as a court. They hitherto have had no acquaintance with the facts and circumstances of any particular case, but they are forced to rely upon the printed or typewritten record without the benefit of examining witnesses, and without any knowledge of the background of each particular case.

It is therefore the most natural things in the world in these circumstances for the members of the Federal Trade Commission to rely upon the word of the attorneys for the Commission and to adopt their point of view.

I will not remark upon the frequent assertion that the Federal Trade Commission is complainant, prosecutor, trial attorney, and judge—all embodied in the same agency. This concentration of function, diversified as it is, has in many cases worked remarkably well, but in other cases it has, I believe, worked to the injury of specific respondents.

I don't know whether it was ever intended that the findings of the Interstate Commerce Commission—rather the Federal Trade Commission, I should say—should be affirmed in all cases if supported by evidence. This word "evidence" just by itself constitutes almost a *reductio ad absurdum*, and it may be partially the reluctance of the courts themselves to disturb the findings of the Commission which has brought about this impasse.

Since, however, the circuit courts of appeal, especially in the *Alpaca* case, and in other cases, have decided the findings of the Federal Trade Commission cannot be disturbed if supported by any evidence, it seems to me that it has become a necessity for the Federal Trade Commission to voluntarily surrender some of the authority apparently conferred by the present Federal Trade Commission Act.

I propose herein merely to call the attention of the members of the committee to some of the other procedural matters which I think can

be improved. It will be conceded that a delay in justice is a denial of justice, and I want to say right there that my criticisms of the Commission is not that it has been too harsh, but in many cases it has not been harsh enough, and certainly it has not been direct or quick enough.

I will cite only three cases where in view of the circumstances, I believe there has been unnecessary and enormous delay in the trial of the issues and in the determination of the cases. May I say in reference to these three cases that I choose them at random. They are not special. I did not make a search for such cases, but they just happen to be three cases that I personally knew about. And in all three cases the issues are so simple that in every one of those cases I would guarantee to write the issues on a postal card.

The first of these cases is the *Phillipine Mahogany case, Indiana Quartered Oak Company v. Federal Trade Commission* (26 Fed. Rep. 2). This case involved the use of the simple term "Phillipine Mahogany" and was back in 1925. The issues are still being litigated and they have been started all over again afresh, under Dockets Nos. 1739 and 1916. That is 21 years and they have been in the courts all that time and they have just begun again.

Perhaps I am doing a great disservice to the legal profession in mentioning these cases, because this looks like it might support another generation of lawyers. It is 21 years already and we are beginning all over again.

The second case I refer to is the *Armand Company v. Federal Trade Commission* (78 Fed. Rep. 2; 707). In this case the complaint was filed June 27, 1925, and the first order of the Commission was entered 8 years later. January 27, 1933.

I think if this case had been tried before a Federal court, or a similar body, it might have taken 3 days or a week. The issue was as simple as you could ever get in a case, but it took 8 years to decide that.

The third case is one in which an appeal is to be heard within the next month or two. I refer to *Federal Trade Commission v. Elizabeth Arden*, and that affects the cosmetic industry especially.

This complaint was issued May 15, 1937, and decided October 3, 1944. The particular order is on appeal and, for many reasons, I do not wish to discuss the merits or demerits pending the possible action of the circuit court of appeals and of the Supreme Court of the United States. However, I do say that the case was not of such complexity as should have required even a half year for its trial and judgment, and if the conclusion of the Commission in that case were correct, such conclusion is much belated. If the conclusion of the Commission in this case were not correct, then a vast injustice has been done to the respondent in this case by the delay.

May I say that there are seven other parallel cases which have not yet been decided which were started at the same time, and in connection with this case I want to refer to another factor in the Arden case. In that case the cease-and-desist order was given by order of the Commission. There was no opinion. Last week in New York City there was a first meeting of the section of the New York State Bar Association called the food, drug, and cosmetic section. There were presented at that meeting a number of papers on this very Arden case, by two very eminent lawyers, and what I war-

to say it that these two papers were diametrically opposed in their interpretation of the cease-and-desist order in the Arden case, which means that after the appeal is heard, and if it is affirmed, the industry won't know what it is all about, because right now we don't know what it means. There has been no opinion, and there has been no direction for the industry to tell what we should do, whether the order is affirmed or reversed.

I shall briefly deal with the proposed sections 3 and 4 of the bill under consideration regarding advertising. Here I may express a certain amount of consistency on my own part as when the Wheeler-Lea amendment was first passed. I objected to transferring the advertising of foods, drugs, and cosmetics to the Federal Trade Commission. I remember the circumstances very well. Furthermore, it is an anomaly that you should have one definition of false advertising in the Wheeler-Lea amendment and another definition of false advertising in the food, drug, and cosmetic law.

I am opposed to lying in advertising, or in labeling, and I don't think the time of this committee should be wasted in dialectics, upon a definition of the scope of false advertising in the Wheeler-Lea amendment and a similar definition in the food, drug, and cosmetic law. I don't care what definition of false advertising we have—and I would adopt the one that is the best protection to the public.

However, I want to call your attention to one practical point. Where you have a nationally advertised article, it is the advertising that brings the customer to the store, and the customer never reads the label. Those two things, the advertising and the labeling, they always spring from the same source, so that it is entirely illogical that we should have two administrative bodies, one dealing with labeling and one dealing with advertising.

There isn't the slightest justification for penalizing certain statements in a label and then permitting the same statements to be circulated in advertisements, and certainly one Federal body should have jurisdiction over advertising and over labeling of the same product.

We have in the Federal Food and Drug Administration a staff of experts who are spending their lives dealing with their particular specialities, and it is an anomaly that with the passage of the Wheeler-Lea amendment the Food and Drug Administration was divested of authority over the advertising of articles whose labeling they supervise and control.

Modern research in dermatology, and in the field especially of allergies, has yearly become more delicate and complicated. The cosmetic industry, through its research program, is yearly trying to introduce safer and better cosmetics. A certain amount of public supervision, both of the formula and of the labeling and advertising of cosmetics is feasible and necessary. The cosmetic industry prefers the expert vigilance of the Food and Drug Administration, and even the corrective hand at times of the Food and Drug Administration, with its corps of experts, to the divided authority of the Federal Trade Commission and the Food and Drug Administration.

In the interest of efficiency and in the public interest, the jurisdiction of all advertising, labeling, and circularization should be returned, according to the provisions of the Reece bill, to the Food and Drug Administration, and it seems to me, with its enormous

and expanding field, the Federal Trade Commission should be very glad to be rid of this small segment of its territory.

In closing, I might say that I have never heard at any time a single word against the integrity of the members of the Federal Trade Commission. But I do say that with the enormous jurisdiction they have, we are entitled to sit down with them and to ask their cooperation in these very necessary amendments.

Mr. ROGERS. What is the difference between the definition of the Federal Trade Commission and that of the Food and Drug Administration?

Mr. MOCK. I think you will find—you are speaking of the Wheeler-Lea amendment?

Mr. ROGERS. Yes.

Mr. MOCK. I think you will find textual differences there.

Mr. ROGERS. What are they?

Mr. MOCK. I have copies here. I will be glad to point them out to you, Mr. Rogers.

Mr. ROGERS. I thought perhaps you knew offhand.

Mr. MOCK. No; I don't know offhand.

Mr. RABIN. Mr. Mock, does the trial examiner have the right to reject offers of evidence?

Mr. MOCK. Yes.

Mr. RABIN. Does that appear in the record?

Mr. MOCK. I think it appears in the record.

Mr. RABIN. It does?

Mr. MOCK. Yes.

Mr. RABIN. The offer of proof does appear?

Mr. MOCK. That is right.

Mr. RABIN. But they have the right to reject it and not receive it?

Mr. MOCK. That is right.

Mr. REECE. May I make this observation by way of interpretation of your remarks with reference to the statements that have been made here that the Commission is in the position of complainant, prosecutor, judge, and jury. The statement so describing the Commission's position is not a criticism of the Commission, because the act itself gives that authority and responsibility to the Commission, and vests it with that power, and the Commission could not exercise its functions if it did not act in those capacities.

Mr. MOCK. But, Congressman, the difficulty is this: In the enthusiasm of combat, the Federal Trade Commission acts like any other combatant. It wants to win. I have seen this: Here is a Commission which represents the public, the consumer—and many of my brothers in the law will bear me out—where a complaint is issued on confusion on the use of a popular phrase like "Alpacuna," or anything else. What does the Commission do? They go to one of these buildings here where there are a hundred girls employed, and they marshal them together and the trial attorney may call these girls one by one, and out of 100 girls he may find that 5 of the girls reinforce the complaint of the Commission, and 95 are dead against it. Now, what happens? Here is the Commission, representing the public. Do we get the benefit of those 95 witnesses, which would help the respondents? We do not. I have actually seen cases where the replies of the first witness is not favorable to the attitude of the Commission, and the

rest of the witnesses are withdrawn. But we never get their names; we are never able to use them.

Mr. REECE. Their names do not appear on the record?

Mr. MOCK. Of course, they never appear on the record.

Mr. REECE. All of which gets around to the fact that, unfortunately, we are all human beings.

Mr. MOCK. Unfortunately, that happens to be the case. Thank you.

Mr. ROGERS. Just one question. What about the right of respondents to subpoena? Do they have the same rights as the Commission as to subpoenas?

Mr. MOCK. It was explained yesterday that they haven't the same right to subpoena duces tecum. They have to get permission, based on an affidavit, of the Commission itself.

Mr. ROGERS. They have to disclose their case before they can get it?

Mr. MOCK. That is correct.

Mr. ROGERS. Would you have any objection to substituting the district courts of the United States for the circuit courts of appeals?

Mr. MOCK. You mean——

Mr. ROGERS. Why shouldn't the respondents have that right? Why should a respondent have to go to the circuit court of appeals when he could go to the district court? Why should he be put to all that expense?

Mr. MOCK. And you mean there would be no further appeal from the district court?

Mr. ROGERS. I don't mean that. I mean why shouldn't we put the original proceedings for review in the district court rather than in the circuit court of appeals?

Mr. MOCK. I think the theory of that was this: In establishing the Federal Trade Commission they felt that the Commission was, in a way, on a level, as a judicial body, with the district court, being a court of first instance, and they felt that the district court was really not intended to function as an appellate court. I see a great deal of logic in what you say. I have thought at times it causes great inconvenience and expense to go to the circuit court of appeals where you might go to the district court.

Mr. RABIN. Thank you, Mr. Mock.

Mr. Sylvester J. Liddy.

STATEMENT OF SYLVESTER J. LIDDY, REPRESENTING THE UNITED STATES TRADE MARK ASSOCIATION

Mr. LIDDY. My name is Sylvester J. Liddy, I am a practicing attorney of New York, and I have been practicing trade-mark law for 20 years. I speak here on behalf of the United States Trade Mark Association.

The United States Trade Mark Association is a nonprofit organization, organized in 1878, which was just 8 years after the passage of the first trade-mark law in the United States. It is, I believe, the oldest organization of its kind in the United States, if not in the world.

The purpose of the United States Trade Mark Association is set forth as follows:

To promote the rights of owners of trade-marks, to secure useful legislation and treaties, and to give aid and encouragement to all efforts for the advancement and observance of trade-mark rights.

In giving support to the Reece bill the association feels that it is carrying out the purpose of its founders.

We are concerned here today primarily with those aspects of the situation with relation to trade-marks. I want to say at the outset that our association is well aware and well pleased with the outstanding work that has been done through the years by the Federal Trade Commission, and its great accomplishments. I wish I had the eloquence of Mr. Charles Murphy, who so well stated that yesterday, but since I haven't, I merely wish to endorse wholeheartedly his remarks in that respect.

Trade-mark questions are always questions of degree. That has been very ably set forth by Mr. Justice Learned Hand, of the second circuit, when he said:

In controversies about trade-marks the question is almost always one of degree, that is, how far does the chance of deception outweigh the inconvenience or worse to the merchant inevitable in compelling him to change his mark, his name, or his package. The degree marks the compromise which the court thinks necessary and desirable. It is the resultant of those unexpressed determinants which collectively we conceal under the term "discretion."

"We do not forget," said Learned Hand, "that from time immemorial this duty has been entrusted to the court."

And I would like to repeat that point:

We do not forget that from time immemorial this duty has been entrusted to courts.

Then Judge Hand continues:

But that is irrelevant, Congress having now created an organ endowed with the skill which comes of long experience and penetrating study, its conclusions inevitably supersede those of courts, which are not similarly endowed.

The United States Trade Mark Association believes that the circuit court of appeals should have the power to modify orders of the Federal Trade Commission and that it is the duty of the courts to do so in a proper case.

We also feel that the decisions of the Commission itself should be based on a preponderance of the evidence.

Now, the circuit courts of appeals have many times in trade-mark and trade-name cases, as well as in other cases, modified orders of the Commission where they thought the remedy was too harsh, and they did that following the Royal Milling case. But with the decision in the Herzfeld case, the second circuit said:

However, since *Federal Trade Commission v. Royal Milling Company* was decided the Supreme Court has as much circumscribed our powers to review the decisions of administrative tribunals in point of remedy as they have been circumscribed in the review of facts. Such tribunals possess competence in their special fields which forbids us disturbing the measure of relief which they think is necessary; in striking that balance between the conflicting interests involved which the remedy measures, they are for all practical purposes supreme.

With all due deference to the Federal Trade Commission, our association feels they should not be supreme in that respect. On the contrary, and particularly when dealing with trade-marks, where as I pointed out, the decision is almost always one of degree, this duty of ultimate decision in such cases should be entrusted to the courts, where from time immemorial the duty has been vested.

A review of the cases will show that in a number of instances the circuit courts of appeals would have modified the decision of the Com-

mission as to the remedy if it had thought it had power. The Alpacuna case has been referred to several times. I shall not spend too much time on it, but in its decision, Judge McLaughlin, of the third circuit, had this to say, and I think it is most significant:

Although we sustain the Commission and its finding as to the name "Alpacuna" because of substantial evidence supporting that finding, we think strongly that the order is far too harsh. It destroys a widely and favorably known trade name, in existence for 14 years; it causes serious injury to the petitioner and its retail outlets. The infraction, as the case now stands, is slight, and could be cured by simple qualifying language. We could dispose of the problem by modifying the Commission's order as suggested, if the practice as outlined in *Federal Trade Commission v. Royal Milling Company*, and *Federal Trade Commission v. Hires Turner Glass Company* was still the law. * * * It is evident, therefore, that the discretion as to the remedy in such controversy as this has now been vested in the Federal Trade Commission. That discretion has been exercised to totally prohibit the use of the name "Alpacuna" to the petitioner. Since the Commission has such power, we are unable, in view of the evidence, to say that the power has been abused in this instance, though under the same facts and circumstances, if we were still in control of the remedy, we would modify the order as above indicated.

I want to point out that in the decision of the Commission itself there was a very strong dissent by Commissioner Freer. It is short, but forceful.

Commissioner Freer dissents from so much of the order as wholly prohibits the continued use of the name "Alpacuna" for the reason that this trade name, which has been in use for more than 13 years, is a valuable business asset and is neither deceptive per se, nor is the testimony concerning its tendency or capacity to deceive sufficiently clear and convincing as to render such prohibition of its use necessary in the public interest.

That was the dissenting opinion of the Commission.

After this decision of the third circuit came down, a petition was filed by the Siegel Co. for rehearing. In opposition to that petition for rehearing the Federal Trade Commission filed a brief. The committee has heard several excerpts from that brief, and they are in the record. I am going to read one that was not mentioned, and which is very short. Throughout the brief, I might say, the Commission repeatedly stated that the circuit court of appeals has no power to modify the order in this case. That was repeated several times, but the particular excerpt I wish to read is as follows:

If there is hardship or inconvenience in the instant matter which requires consideration, that is a matter which should be at least specifically referred back to the Commission for primary consideration as stated in the El Moro case.

Now, the very next sentence—

It is submitted, however, that there is none that will justify a modification of the order.

Here we have the Commission saying to the court, "If you feel that there is hardship, send it back to us for consideration. We feel that there is no hardship that would justify a modification of the order." Obviously a remandment under such circumstances would be futile. Perhaps such an anomalous situation is inevitably inherent in a governmental agency that tries, impartially, to be sure, to function as judge and prosecutor at one and the same time. It seems to us the zeal of the Commission, in its role of complainant and prosecutor is hardly consonant with the impartiality and fairness required of a Commission when it sits as a judge.

Mr. RABIN. If the Commission's position were correct, then that word "primary" would be surplusage?

Mr. LIDDY. We think, as does the Reece bill, a proper safeguard should be provided to see that justice is done.

Mr. REECE. The provisions of H. R. 2390, in this respect, do not undertake to remove any power from the Federal Trade Commission, but simply, being in the position that it gets in, under the law, gives the court power for a full review of its action.

Mr. LIDDY. That is my understanding exactly.

There are several other cases. This is not an isolated instance. But I am not going to burden the committee with further references now. I am going to file a memorandum on that.

I want to conclude with just one general observation, but I believe it is pertinent. In the history of our country I may well say that the present is the product of our past, and, by the same token, if there is going to be an outgrowth of this present; so what his generation does unquestionably is going to shape our future. If, therefore, we fail wherever possible to restore to the courts the powers which have been inherently and traditionally theirs, then I see we are bound, in the course of time, to upset that system of checks and balances which the founders of this country insisted on and found so necessary, and I honestly feel that no one, intentionally or otherwise, would want to upset that balance.

I thank the committee for its courtesy.

Mr. O'HARA. Why should there be anything wrong about permitting a person aggrieved by an order of the Federal Trade Commission to have his appeal in a district court? In your opinion, would there be so many appeals to such a court?

Mr. LIDDY. I think, sir, if I may answer your question this way—in this instance it is the circuit court of appeals—had the power to modify, and if a case came up to them on the preponderance of evidence rule, so that they themselves could weigh the evidence, which they cannot do now, then I think it would not be necessary to have this trial de novo in the Federal court. I am not opposed generally to the idea of trial de novo, but let me say this: The Federal Trade Commission has been set up for this purpose, and as I said before, has done an excellent job. Perhaps if all of that work were to go to the district courts, a second time, there would be unnecessary duplication, sir. I am always personally in favor of having a proper and full review by the court, whatever court that may be, but I do feel we should avoid, wherever possible, duplication. Does that answer the question?

Mr. O'HARA. Well, partially.

Mr. ROGERS. I just want to get your reaction on this: Why should a respondent be required to go to the circuit court of appeals instead of using the district courts? Isn't it usual for a respondent to have his case tried in the lower court?

Mr. LIDDY. I think we could, sir, have appellate jurisdiction in the district court.

Mr. ROGERS. Don't you think you would get the same relief in the district court that you get in the circuit court of appeals?

Mr. LIDDY. I think you would, but it adds an additional step. You see this litigation is pretty lengthy, perhaps of necessity. Now, if we go first to the district court, we should again have the right to go to the circuit court of appeals, and in a proper case, to the Supreme Court of the United States. Unless there would be very strong reasons for it, I myself would not want to add an additional step to prolong that litigation, just as in some instances we skip a court in other fields. But I myself would have no objection to it. I personally feel that the more opportunities our courts have to review judicial matters, with the experience and training that they have, I say give it to the courts, whatever court that may be.

Mr. ROGERS. Don't you think it would be less expensive for a litigant to go into district court, rather than way up to the circuit court?

Mr. LIDDY. I haven't thought that through, sir. I would say it perhaps would be a little less expensive, but not materially so in the long run.

(A brief submitted by Mr. Sylvester J. Liddy, on behalf of the United States Trade Mark Association, is as follows:)

MEMORANDUM OF UNITED STATES TRADE MARK ASSOCIATION IN SUPPORT OF THE
REECE BILL (H. R. 2390)

The United States Trade Mark Association is a nonprofit organization founded 68 years ago, in 1878. Its purpose as established by its founders is to promote the rights of owners of trade-marks, to secure useful legislation and treaties, and to give aid and encouragement to all efforts for the advancement and observance of trade-mark rights.

In giving support to H. R. 2390, the Reece bill, the association believes that it is carrying out the purposes of its founders.

A large number of cases coming before the Federal Trade Commission have involved the use of trade-marks. For example, one of the recent and important cases, is that of *Jacob Siegel Co. v. Federal Trade Commission*, decided by the United States Circuit Court of Appeals for the Third Circuit on November 30, 1944, involved the use of the well known "Alpacuma" trade-mark. This case will be referred to in more detail hereafter.

It is with cases of this kind that the United States Trade Mark Association is primarily concerned. As the courts have so well said—

In controversies about trade-marks * * * the question is almost always one of degree, i. e., how far the chance of deception outweighs the inconvenience, or worse, to the merchant inevitable in compelling him to change his mark, his name, or his package. The decree marks the compromise which the court thinks adequate and necessary; it is the resultant of those unexpressed determinants which collectively we conceal under the term "discretion". We do not forget that from time immemorial this duty has been entrusted to courts, but this is irrelevant.

The court then continued, however, in commenting upon the limitations imposed upon it in reviewing decisions of the Federal Trade Commission—

Congress having now created an organ endowed with the skill which comes of long experience and penetrating study, its conclusions inevitably supersede those of courts, which are not similarly endowed.¹

The United States Trade Mark Association believes that the circuit court of appeals should have the power to modify orders of the Federal Trade Commission and that it is the duty of the courts to do so in a proper case. This is a particularly necessary safeguard where, as in the case of the Federal Trade Commission, the Commission is complainant, judge, and jury.² We wish to say parenthetically at this point that our association is well aware of the outstanding work of the Commission but believes nevertheless as a matter of principle that the Commission should be required to base its rulings on a preponderance of the evidence and that the reviewing court should have the power to modify the ruling of the Commission when in the opinion of the

¹ Learned Hand, Jr., in *Herzfeld v. Federal Trade Commission* (140 F. (2d) 207 at 209, C. C. A. 2d Cir.).

² *John Bone v. Federal Trade Commission* (229 F. 468).

circuit court the interests of justice require such modification. This is the primary purpose of the Reece bill and the United States Trade Mark Association supports it.

As the sponsor of this bill, Representative Carroll Reece has pointed out, the amendment proposed under H. R. 2390 is not an innovation in our law.

The Walsh-Healey Act requires that the findings of the Secretary of Labor must be supported by the preponderance of the evidence (U. S. C. title 41, sec. 39). Under the Commodity Exchange Act orders of the Commission reviewing or revoking designations of contract markets must be supported by the weight of the evidence (U. S. C. title 7, sec. 9).³

With respect to the power of the circuit court of appeals to modify orders of the Federal Trade Commission, it is of interest to note that the second circuit court of appeals modified orders of the Federal Trade Commission several times on the authority of the *Royal Milling Co.* case⁴ but that court has now recognized that it does not have the power to modify. In *Herzfeld v. Federal Trade Commission*⁵ Judge Learned Hand for the court said—

However since *Federal Trade Commission v. Royal Milling Co.* was decided the Supreme Court has as much circumscribed our powers to review the decisions of administrative tribunals in point of remedy as they have been circumscribed in the review of facts. Such tribunals possess competence in their special fields which forbids us to disturb the measure of relief which they think necessary. In striking that balance between the conflicting interests involved which the remedy measures, they are for all practical purposes supreme.

The United States Trade Mark Association believes that in this respect the Federal Trade Commission, or any other commission, should not be supreme but on the contrary and particularly when dealing with trade-marks and where the question is almost always one of degree, that the duty of ultimate decision of such cases should be entrusted to the courts where from time immemorial this duty has been vested.

A review of the cases will disclose that in many instances the courts would have modified orders of the Commission if they had the power to do so. For example, in the *Alpacuna* case⁶ the Circuit Court of Appeals for the Third Circuit stated:

Although we sustain the Commission on its finding as to the name (*Alpacuna*) because of substantial evidence supporting that finding, we think strongly that the order is far too harsh. It destroys a widely and favorably known trade name, in existence for 14 years. It causes serious injury to the petitioner and its retail outlets. The infraction, as the case now stands, is slight and could be cured by simple qualifying language. We could dispose of the problem by modifying the Commission's order as suggested, if the practice as outlined in *Federal Trade Commission v. Royal Milling Co.* (288 U. S. 212), and *Federal Trade Commission v. Hires Turner Glass Co.* (3 Cir. 81 F. (2d) 362) was still the law. * * * It is evident, therefore, that the discretion as to the remedy in such controversy as this has now been vested in the Federal Trade Commission. That discretion has been exercised to totally prohibit the use of the name "*Alpacuna*" to the petitioner. Since the Commission has such power, we are unable, in view of the evidence, to say that the power has been abused in this instance, though under the same facts and circumstances, if we were still in control of the remedy, we would modify the order as above indicated. Order affirmed.

It is interesting to note the position taken by the Federal Trade Commission in this case. After the above-quoted decision of the Third Circuit was handed down in November of 1944, the Siegel Co. petitioned for a rehearing. In its brief in opposition to the petition of the Siegel Co., the Federal Trade Commission vigorously maintained that the court had no power to modify the order of the Commission. Witness the following excerpts from the Commission's brief:

Unless the findings and order are either (a) outside of the line of the evidence, or (b) represent abuses of discretion, there is no power in the courts to disturb such findings and order.⁷

³ Congressional Record for Tuesday, March 6, 1945.

⁴ *Federal Trade Commission v. Royal Milling Co.* (288 U. S. 212; 77 L. Ed. 706).

⁵ 140 F. (2d) 207 at 209.

⁶ *Jacob Siegel Co. v. Federal Trade Commission* (150 F. (2d) 751 at 755, 756).

⁷ *Jacob Siegel Co. v. Federal Trade Commission*, Brief for Respondent (F. T. C.) on Petition for Rehearing, p. 24.

And again—

In view of the facts and the law as above presented, it is strongly contended that the court has not the power to "modify" the order in this case.⁸

And again—

If there is a hardship or inconvenience in the instant matter which requires consideration, that is a matter which should be at least specifically referred back to the Commission for primary consideration as stated in the *El Moro* case. It is submitted, however, there is none that will justify a modification of the Commission's order. It is still contended, we repeat, that the court has no power to modify the order in this case. * * *.⁹

The court while disagreeing vigorously with the remedy provided by the Commission agreed with the Commission on the point that the court had no power to modify and said (on the petition for rehearing):

After carefully considering the question of possible modification of the Federal Trade Commission's order, we feel compelled to adhere to our original decision which we confirm.¹⁰

Here we find the Commission saying in effect to the court—if there is hardship on the petitioner return the case to us—we feel there is no such hardship as would require modification of our order. To remand a case to the Commission under such circumstances would be futile.

Perhaps such an anomalous situation is inevitably inherent in a governmental agency which tries to function as prosecutor, judge, and jury at one and the same time. The zeal of the Commission in its role of complainant and prosecutor is hardly consonant with the judicial temperament and impartiality required of the Commission when it sits as trier of the facts. Certainly it is not improper to seek, as does the Reece bill, that a proper safeguard be provided to insure that justice is done.

The *Alpacuna* case shows clearly the need for the relief provided by the Reece bill. But the *A'pacuna* case is by no means an isolated instance of the need for this relief. The Committee on Interstate and Foreign Commerce is respectfully referred, for example, to the case of *Parke, Austin & Liscomb v. Federal Trade Commission*,¹¹ where the second circuit speaking through Judge Chase said:

The petitioners are standing upon firmer ground when they insist that this paragraph in the order is needlessly severe in its sweeping requirement * * *. There may well be some alternative remedy less drastic but adequately effective which might satisfy the requirements of fairness and should be adopted. On this record, however, we cannot be sure that the Commission has abused its discretion. In this respect, and only in that event should we interfere with its action.¹²

The United States Trade Mark Association respectfully urges that H. R. 2390 be approved for the reasons set forth above and the association likewise endorses the additional provisions of the Reece bill including those which seek to overcome conflict in jurisdiction with the Federal Food, Drug, and Cosmetic Act¹³ and the provisions of the bill which would limit the aggregate amount of penalties. In the opinion of the association the additional provisions are all desirable amendments to the Federal Trade Commission Act.

Respectfully submitted.

SYLVESTER J. LIDDY, Counsel.

NEW YORK, N. Y., January 21, 1946.

Mr. RABIN. The district court, as one of original jurisdiction, would try the facts, and the circuit court is an appellate court. That is why, I assume, all these administrative bodies go right to the court that has appellate jurisdiction.

Mr. O'HARA. The trouble is, to go to the reviewing courts you have to have a disputed question of fact. If the court heard the facts, we would have a different situation.

⁸ Same, p. 49.

⁹ Same, p. 40.

¹⁰ 150 Fed. (2d) 751 at 756.

¹¹ 142 F. (2d) 437 at 441, 442.

¹² See also *Indiana Quartered Oak Co. v. Federal Trade Commission* (26 F. (2d) 340, at 342, 343).

¹³ U. S. C., title 21, sec. 301, approved June 25, 1938.

Mr. RABIN. I am assuming that this provision be written into the law.

Mr. Kenneth Perry.

STATEMENT OF KENNETH PERRY, REPRESENTING JOHNSON & JOHNSON, NEW BRUNSWICK, N. J.

Mr. PERRY. Mr. Chairman and gentlemen, my name is Kenneth Perry; I am an attorney, vice president and general counsel for Johnson & Johnson, manufacturers of surgical dressings, New Brunswick, N. J.

I should like to address myself briefly to two points; one, preponderance of evidence, and the other, modification of remedy. I appreciate that both of these have been rather carefully surveyed by prior witnesses, but I should like to ask, in an attempt to find a proper solution, what may be said in opposition to the proposals of the Reece bill.

Coming down on the train day before yesterday I read for the first time the letter from the Chairman of the Commission addressed to this committee, dated, I believe, March 27, 1945. It is a history of the long and very distinguished record of the commission, a record of which I am sure every commissioner and every member of the commission staff is justly and properly proud.

The position of the Commission appears summarized in that statement in two words—unnecessary and inadvisable. Unnecessary, because as I gather from reading that statement the Commission does decide its cases by the preponderance of evidence, and because its remedies are not unreasonably harsh or severe, therefore inadvisable.

I cannot go along with that position. Justice is a matter of right, not a matter of indulgence or a matter of grant by this commission or any other commission. Someone may say, "Why must that be in?" The Commission has erred. It has been reversed by the circuit court of appeals. It has been reversed by the Supreme Court, particularly prior to the recent decisions of the Supreme Court on the labor law, where the Court has taken the position that it did not take formerly, that the word "modify" in the statute has no meaning. The word "modify" as Dean Stason said, has been written out of the statute by the Supreme Court, and it was not written out until the labor cases came along.

Now, in recent weeks, the Alpacuna case, in which either one Commissioner or four Commissioners erred. I don't presume to say which it is, but certainly some Commissioner erred, and possibly four, because there was a dissenting opinion, and Commissioner Freer did not agree with the others, and he was quite strong in his dissent.

Mr. REECE. The fact that we gave the Court of Appeals the right to review the decision of the courts of original jurisdiction is not any reflection upon the inferior courts, and the fact that we gave the Supreme Court the right to review the decisions of the Court of Appeals is not any reflection upon the character, ability, or integrity of the judges who constitute the lower court, and I think it would be unfortunate in this case if in an effort to give a full review by the courts of the actions of the Commission, it should be construed by anyone within the Commission, or elsewhere, as in any way reflecting upon

the character, integrity, or ability of the members of the Commission or the members of the Commission's staff.

Mr. PERRY. I go whole-heartedly with all of that.

Mr. O'HARA. Of course, some of the judges feel hurt by an appeal from their decision. I think that is not a privilege of the court, but I believe we all feel that we have that right to appeal.

Mr. PERRY. Certainly. I would like to comment, since you bring that up at this point upon this matter of review in the district court as distinguished from the circuit court and trial de novo. I am 100 percent for trial de novo in the district court. When I try a case I want a third party as the judge. I don't want my adversary as the judge.

We have been told about the Commission being an investigator, the prosecutor, the jury, and the judge. But there is another thing that it is; it is the litigant, it is a party to the complaint. It is the Federal Trade Commission against Kenneth Perry; it is the Federal Trade Commission against Siegel, and it wants to win its cases. Who doesn't want to win his cases? Every attorney in the Commission wants to win his cases; the chief counsel of the Commission wants to win his cases.

In the common law we have an old motion *sui spontani*; the court of its own motion vacating or modifying its order or decree. I may be wrong, but I don't know and I don't think there is a case where, after the severe criticism by the circuit court, the Federal Trade Commission, *sui spontani*, has taken back its order and modified it in accordance with what may be, as in the *Alpacuna* case, the opinion of one of the Commissioners, or the opinion of the court. It waits to be forced to modify its decree. It is a litigant all the way through.

While it is a litigant it passes upon the rules of evidence. I think that any fellow who has tried a case knows that if he is given the power and the right to lead his own witnesses, he will be quite successful, he will have very little difficulty; and that is precisely what does happen. He leads his witnesses, he gets the testimony he wishes, and then he passes upon the rules of evidence with respect to the introduction of testimony of the adversary.

Mr. ROGERS. Let me ask you this question: Isn't this provision in here tantamount to a de novo trial:

If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper.

Now, if you go to the district court for this review, and you find you have left out some evidence, instead of the court hearing it, they can refer it back to the Commission and the Commission has to hear that evidence, and then it comes back to the court, and it is tantamount to a trial de novo.

Mr. PERRY. Mr. Rogers, in trying a case you like to have a third party pass upon the admissability of the evidence and motions made. You don't like to have your adversary pass upon them. If you have gone to the district court for a review, thereby creating a tug-of-war, with both sides wanting to win its case, and it is then sent back to

the commission, I wouldn't expect to get an extraordinary fine result. There is a lot of evidence already in that should not be in, by leading questions and irrelevant and incompetent and immaterial testimony, or hearsay, and by breach of every rule of evidence.

By the same token we have the commission in its letter stating, and I think it is probably a fact—I am not criticizing the administration, I am criticizing the law; I am criticizing the statute, the way it is operating, and the interpretation given by the Supreme Court—that the word “modify” is not in the statute.

The Commission takes the position in its brief to this committee that the substantial evidence rule is the proper one, because more certain. Now, preponderance of the evidence is the rule adopted by the common law over a good many hundreds of years of experience, and it is in force in all our State courts of record, and in our Federal courts, and in the courts of England, and of every other common-law country that I know of. It may be less certain than another rule. I think the scintilla rule is probably the most certain, if we are after certainty. But we are not after certainty, we are after justice, and we are entitled to the preponderance of the evidence rule.

Dean Stason, when he was speaking here yesterday morning was asked a question by Chairman Lea as to whether a fair trial did not obviate the necessity of modification of the remedy, and the Dean said “No,” because the evidence, the primary evidence, must be used to reach the ultimate question of fact, which is inference. And I would like to give an instance of that in the Alpacuna case.

The Commission's rule with respect to false and deceptive acts and practices is whether the careless, the ignorant, the illiterate, or the foreign-born will be misled, whether a trade-mark has the tendency or capacity to mislead the careless, the ignorant, the illiterate, or foreign-born. It is not a rule for the wary, or the intelligent, or even the average man.

Now, when questions are asked of the witnesses, they do not say, “Are you careless, are you ignorant, are you illiterate, or are you foreign-born?” There is no primary evidence on that. That is an inference to be drawn from the testimony. And, unfortunately, only drawn one way.

The woman who testified in a trade-mark case that she was misled by the trade-mark, and was asked, “Does the Wilmington Trust Co. belong to the city of Wilmington,” said, “Why, yes.” “Is the United States Steel Corp. connected with or owned or sponsored by the United States Government?” She said, “Why, certainly.” Now, she was misled by this trade-mark, and the rule was created for her. And I am not arguing that that is not a proper approach, but the Commissioners do not qualify as careless, ignorant, illiterate, or foreign-born in reaching a decision as to who is misled. They must infer, and their inference as to what the careless, the ignorant, the illiterate or the foreign-born would believe is no better than the district court judge, or the circuit court judge, or yours or mine, or anybody else. They don't even see the witness. They can't even look and see if he is ignorant, or illiterate. A judge in a district court can. The only way the Commissioners can judge is from the record, from which you and I could judge, too, and so could a circuit court. I say *au fortiori*, if the preponderance of evidence rule applies in the district court, and if the modifica-

tion of unreasonably harsh and severe remedies applies in the district court, it should most certainly apply in the Federal Trade Commission cases, or give us a trial de novo in the district court, which I think is a splendid alternative. I don't think we need both of those, but I think that would be a very wholesome thing. I don't think there would be many cases, Mr. O'Hara, because most of them are wrong. The Commission is generally right; the Commission is right in an overwhelming percentage of the cases. Most of the cases should not even be tried. If the attorneys were familiar with the law they wouldn't try many of these cases, because their clients are wrong, the practice is bad from the beginning, they shouldn't be in it. But there are cases that are border line, there are cases that are different, there are cases where the trade-mark is worth millions, and that party is entitled to a full, dispassionate, unbiased trial before a court, not where his adversary is the judge and the jury, ruling on the admissibility of the evidence in his case and the inference to be drawn. Bear in mind, all I am saying is not against any Commissioner or anybody in the Commission. I have a lot of friends over there, and I like them all, and they are a fine crowd, doing a great job. But I am addressing myself to this statutory law.

Mr. ROGERS. Suppose these cases were taken before a special master?

Mr. PERRY. If you will have a special master who is responsible to the district court, or the circuit court, and not on the pay roll of the Commission, and who can make a report, make findings, I think there is a great deal to be said for that, a great deal. I certainly would like it.

Mr. O'HARA. The damage is done when that testimony is in.

Mr. PERRY. The master would hear and be the judge of the admissibility of the testimony and make the rulings, and he would make the findings and the inference, and they would be subject to review.

Mr. O'HARA. How many appeals to the circuit court of appeals have there been per year over the last 5 years.

Mr. PERRY. Quite a few. I think you might better ask that of Mr. Kelly, or somebody in the Commission, but there are not many. As I say, it is patently bad practice, as a rule, on the part of the company.

Mr. RABIN. The objection that you raise is one that goes to all quasi-judicial administrative agencies, is that not so? I don't raise the point that we should refuse to change it here because it applies to the others, but that is true, isn't it? We are now formulating a new branch of the law, so to speak, with the advent of the administrative agencies. Isn't that the situation?

Mr. PERRY. Yes, it is, Mr. Rabin, except that I think if we are going to have justice instead of expedition and ease, we are going to have selectivity in administration and application of our laws.

Take the word "Vicuna." I have a good many friends who are college graduates and professional people, doctors and engineers and chemists, and I have asked a good many of them in the last few weeks, "What is Vicuna?" Unfortunately they don't fit in the class of careless, ignorant, illiterate, or foreign-born because they don't know what it is, but apparently the careless, the ignorant, the illiterate, the foreign-born would be misled into thinking Vicuna was Alpacuna. For the benefit of anybody who doesn't know, it is the hair of a small animal, very rare, found in the high mountains of Peru, and has been in pro-

duction commercially only for a few years. I don't know how many of the careless, the ignorant, the illiterate, or the foreign-born would be misled, because the coats cost about \$900.

Mr. O'HARA. I wonder just when you determine a person is ignorant? I suppose it is simple to determine when a person is foreign-born.

Mr. PERRY. No question about it.

Mr. O'HARA. I wonder how many of us would qualify in the other categories.

Mr. PERRY. Under the rulings I haven't qualified yet, because I haven't been misled by any of these possibilities.

Mr. RABIN. You say the Commission cannot detach themselves when sitting as judges; they are anxious to win their case. Do you believe that to be the general situation?

Mr. PERRY. Now, look; I am just one fellow——

Mr. RABIN. Is it part of their job?

Mr. PERRY. Ask any attorney who practices before the Commission, when he gets a complaint does he think he has got the same shake he has got in the district court, or does he think he has got two strikes on him. Quite frankly, how many cases does the Commission lose?

Mr. RABIN. Well, you say most cases are justified.

Mr. PERRY. Most of them are, but the difficulty comes where it can control the testimony. It is a litigant. As Mr. Mock pointed out, when it secures its witnesses, it doesn't do it as a judicial organization; it secures them as a litigant, as you or I, or any other attorney would, but when it comes to putting them on the stand, at that moment it becomes judicial. I don't think you separate those functions. I don't think a man, by putting on a robe, steps from being a litigant to being a dispassionate, unbiased, fair judge. I think the system is wrong.

Mr. RABIN. If you carry that to the logical conclusion, you would not permit this agency or any other agency to try a case.

Mr. O'HARA. There may be a very serious question there as to whether they could get justice.

Mr. PERRY. I think it is proper, if there be sufficient safeguards. I think the circumstances of our times require some such administration, but the safeguards must be very great. I am addressing myself in support of the Reece bill. I think that is the solution at the moment.

Mr. RABIN. Wouldn't the true solution lie in the direction of surrounding that procedure with proper safeguards?

Mr. PERRY. Yes, sir. But unless that is done, then I would like to have the opportunity that Mr. O'Hara may be willing to suggest, of a trial de novo in the district court.

Mr. RABIN. Directing your attention to the bill itself. You referred to the fact that under the present decisions the word "modify" has been practically stricken out of the law. That was testified to by the law-school professor who addressed us yesterday. Now, in connection with this proposed bill let us assume that the court does find a preponderance of evidence to support the Commission's finding—a finding that some relief should be given. Do you believe, as the bill is now written, the courts will again strike out the word "modify" from this bill, or is it clear enough that they have the right to modify?

Mr. PERRY. I wouldn't have the doubt expressed by the dean, although I must say he is a far more learned man than I am, and his judgment is entitled to far more weight, but I wouldn't entertain the doubt that he entertains that if now, after the decisions of the Supreme Court, you went back and strengthened the language, that the court would again say the word "modify" is not intended to mean modify.

Mr. RABIN. You think the language is strong enough as it is now?

Mr. PERRY. Particularly so if in the report you cite the reason for the change, that it was to take care of the decisions of the court in those cases.

Mr. RABIN. I don't know what this committee will recommend, of course, but you believe it is strong enough?

Mr. PERRY. I believe it is adequate. Mr. Chairman, provided the committee report states why the change in language was put in the act.

Thank you very much, gentlemen.

Mr. RABIN. Thank you very much.

STATEMENT OF DR. ROBERT L. SWAIN, EDITOR, DRUG TRADE NEWS, NEW YORK, N. Y.

Dr. SWAIN. Members of the committee, my name is Robert L. Swain, my address is 340 West Forty-second Street, New York. For 20 years, however, from 1920 to 1940, I was a member of the staff of the Maryland State Department of Health, where I was in charge of the administration and enforcement of the State Food, Drug, and Cosmetic Act, and all the other laws in that State bearing in any manner upon the production and distribution of drugs and medicines. I mention that because in some degree the duties which came under my jurisdiction were somewhat similar to those with which the Commission has to deal, and it may be that the experience I had in that work may be of some some value to this committee in determining its attitude with respect to the Reece bill.

I am going to speak, if you will permit me, very briefly—I think I can finish in 10 or 15 minutes—of the principles which I think are of general application to the issues presented here, and I am awfully glad that Mr. Reece made the observation, which of course is perfectly clear to everyone, that we are not dealing here with whether or not the Commission is a defendant, but we are dealing with provisions of the law which may or may not have been intended to have the result which they have been given, and to express the necessity, as Mr. Murphy said yesterday, of deciding whether a policy which has been developed is to be continued and the responsibility of whether the policy is to be continued or not rests with Congress.

Now, if there is one thing that I learned through my several years of law enforcement, it is that in order to render fair-minded judgment, the prosecution should be limited to the institution of the case, the collection of evidence, leaving to the jury the evaluation of the evidence and the court to see that justice is done.

I have come to the deep-seated conviction that the motives which govern the prosecutor on the one hand and the judge on the other are so basic in their differences that they can never be safely entrusted

to one single individual. My experience has taught me the line between prosecution and persecution wears terribly thin when the prosecuting official functions as complainant, prosecutor, judge, and jury.

The psychological motivation of each of these contrasting activities is so pronounced and so unyielding that it is virtually impossible for a completely impartial verdict when these functions are merged to be reached. The complainant insists upon the validity of the evidence, the prosecutor zealously seeks a conviction, and these two militant attitudes are always present when the same individual seeks to weigh the evidence and sit in judgment in the case.

Let me again assert that my 20 years of active law enforcement and administrative work convinces me that, as a matter of sound governmental procedure, the complainant and prosecutor serve one function and the jury and the judge another, and that these functions are so sharply dissimilar and divergent that common sense demands they be entrusted to separate and distinct hands.

Now, as the committee well know, and as Mr. Perry well referred to, it is a time-honored maxim that "No man should be a judge in his own case." This seems to me to exclude a man from sitting in judgment upon a case which he himself has instituted, and for which he has collected the evidence, because, in a very real sense, he becomes a party in interest. It is his case. He is concerned with maintaining the position which he has taken and he is determined that the outcome of the case shall be consistent with the zeal, the energy, and the planning with which the prosecution has been carried on.

Mr. O'HARA. Will you permit me to interrupt there?

Dr. SWAIN. Yes.

Mr. O'HARA. In most States, I know in my own State, the trier of the facts, be it judge or the jury, are subject to disqualification as to their qualifications, if they are biased or prejudiced, in both civil and criminal cases.

Dr. SWAIN. Yes; and very frequently a judge, of his volition, will ask to be excused from participating in a case which he may have had some relation to other than that of judge.

This is not a criticism of the attitude manifested; rather, it is simply a recognition that human nature is human nature, and it cannot be changed in any fundamental sense by legislation or any other official process.

My relatively long experience as a law administrative official also convinces me that enforcement officials are likely to find their whole official attitudes influenced by the prosecution complex. By this I mean that, once a case is instituted, the enforcement official instinctively takes a position looking to the punishment of the wrongdoer. Every fact in evidence and every phase of the facts are construed and evaluated in terms of how much they will contribute to a conviction.

The prosecution complex not only sharply restricts the enforcement official to the prosecution side of the case, but induces him to give undue emphasis to the various elements which make up the case. In other words, the prosecution, unless constantly striving to avoid it, becomes prosecution-minded. He becomes the victim of mental attitudes which completely alienate any ability to see innocence or mitigating circumstances favorable to the other side.

As a matter of fact, not infrequently while I was with the State Health Department of Maryland, I found it desirable to accompany my own men on their field inspections, because I had one or two experiences which made me know that in their zeal to present a case as it might appeal to me, or as it might appeal to my superiors, let me say, whether unconsciously or unintentionally, perhaps, but material evidence was suppressed and I would be placed in the unfortunate position of having the case tried in court and having this information come to my attention for the first time on cross-examination of a witness. Of course, that is embarrassing, and it also creates the impression that the enforcement agency is not on the level and, in order to avoid that, I frequently went with my own men, just to be sure that got every fact that should get, and that in their zeal they did not suppress or withhold information material to the case, irrespective of which side of the case it might help.

Now, it seems to me that in listening to the testimony here yesterday, and from my somewhat sketchy familiarity with the procedure of the Federal Trade Commission, that we are face to face with this proposition. Everyone knows, certainly every member of the bar knows, the function of a grand jury in criminal justice.

The grand jury sits in a body of 24 men. They hear witnesses; they bring witnesses before them. They are in position to determine the credibility of this particular witness as against the other, and after they obtain a sufficient amount of evidence, which we know must be very substantial, they bring in an indictment.

Now, would anyone contend that an indictment by a grand jury should be tantamount to a conviction, in spite of the fact that the evidence is very substantial, because no grand jury would submit a man to the hazard of prosecution, in which tremendous issues are involved, unless the evidence was of a most substantial character. And yet our sense of justice would rebel against making an indictment by a grand jury tantamount to conviction, irrespective of the amount of evidence. And yet we do, in a sense, permit that here, because if there is, as the committee has had urged on it a number of times, if there is substantial evidence appeal to the circuit court of appeals is virtually nonexistent, and in a very practical manner, evidence which is far less substantial, perhaps, is accepted as tantamount to conviction.

I want to stress that analogy to the committee, because it seems to me it is exactly in point and, as I said before, your sense of justice, and mine, and that of the country as a whole, would rebel against making a grand-jury indictment tantamount to a conviction.

I am not going to take the time of the committee to again stress the complainant, prosecutor, judge, and jury operations of the Federal Trade Commission, but I do want to make one observation, and that is that on the Supreme Court itself some opposition to this proposition has developed. In a case some time back, involving the Federal Power Commission, the question before the Court apparently was how much authority it had to revise or modify a finding of the Commission. The Commission held that they had no authority at all, and Mr. Justice Jackson made this forthright observation [reading]:

If we are to hold a rate is reasonable, just because the Commission has said it is reasonable, review becomes a costly, time-consuming pageant of no practical value to anyone.

That statement, gentlemen of the committee, is not made by the bar here, by any witness here; it is not made by anyone who has some special purpose to serve. It is made by Mr. Justice Jackson, and he said [reading]:

If we are to hold a rate is reasonable, just because the Commission has said it is reasonable, review becomes a costly, time-consuming pageant of no practical value to anyone.

If you will paraphrase that and use the Federal Trade Commission in place of the Federal Power Commission, I think we are right back where we were with Mr. Jackson on review—your Commission case, as a practical matter, is a costly, time-consuming pageant of no value to anyone.

Now, with respect to the preponderance of evidence, I wish to make one observation, and then I will have finished. I cannot see any logic in permitting this law to continue in such form as to exclude judicial review of Federal Trade Commission cases. My mind goes back to a labor case in Chicago not long ago where, to use Mr. Rogers' statement, the judge of a Federal court had no hesitation in setting aside a ruling of the President taking over a billion-dollar mail-order house, and yet that same judge would have been completely powerless to set aside an action of the Federal Trade Commission, if there was any evidence to support it, even though he knew it was clearly wrong. It seems to me from the standpoint of logic it almost reaches the point of absurdity, and I want to say that it seems to me that his bill proposed by Mr. Reece is completely reasonable; it takes no powers away from the Commission that the Commission has a right to have, and it is a step in assuring justice in those relatively small number of cases in which the question of justice is still open, irrespective of the fact that the Commission has rendered its relief.

Finally, I would like to make one brief comment with respect to that provision of Mr. Reece's bill which seeks to clarify the confusion and conflict which has arisen between the Federal Trade Commission and the Food and Drug Administration on essentially the same state of facts.

I listened very attentively yesterday when Mr. Reece gave a chronological statement with respect to the enactment of the Food, Drug, and Cosmetics Act, and the Wheeler-Lea bill. It happens that I was active in those matters at that time and conferred many times with others, and with Senator Copeland, as the bill went through its various stages leading up to the one finally adopted; and if there is one thing that is clearly impressed on my mind, it is that for once in our lives we thought we had rendered impossible a conflict in jurisdiction, such as has since developed.

I have gone back and read the reports of the committees, and it is clear beyond doubt that Congress meant to leave all questions of labeling in the Food and Drug Administration and to give the Federal Trade Commission jurisdiction over advertising. In reading that language and in going back to the records of the committees, it is difficult to understand how this conflict developed. If language can accomplish anything, I thought we had accomplished that aim back in 1934 to 1938.

Mr. REECE. May I interrupt?

Dr. SWAIN. Yes.

Mr. REECE. I feel quite confident in my own mind that you are correct in your statement that it was assumed at the time of the enactment of the Pure Food, Drug, and Cosmetics Act, and the Wheeler-Lea Act, that all parties felt the possibility of conflict if jurisdiction had been removed, and I understand it was not thought otherwise in any quarter at that time, and that the conflict of jurisdiction actually arose out of the interpretation which the court placed upon the provisions of section 15.

Dr. SWAIN. That is right.

Mr. REECE. Which decision gave the commission this authority which reached out into the field of labeling, and then after the Court gave the authority to the Commission there was no longer any question that the Commission did have authority. Therefore, the conflict in jurisdiction arose as a result of judicial interpretation, which was not anticipated by any of the parties, and—I think I am right—even by the Federal Trade Commission itself.

Mr. O'HARA. And you get back to the position of the industry. They are wondering where they are going to be harassed, and from which side.

Mr. REECE. Quite so. The statement, not only of the industry, but also, Dr. Swain, of yourself, who was concerned with this law, not primarily as it affects industry, but primarily as it affects the consuming public, as to whether all advertising of food, drugs, and cosmetics, should not be placed with the Food and Drug Administration. For that reason you were one, Mr. Dunn was another, and, of course, Mr. Campbell, Director of Foods, Drugs, and Cosmetics, and others, who were primarily concerned with the effect upon the consuming public, took a very strong position that all exercise of authority over these commodities should be placed in the Pure Food and Drug Administration, and I am one of those who undertook to effect a compromise in view of the fact that the Federal Trade Commission already had jurisdiction over advertising in general, by which this subject could be divided without suffering a conflict in jurisdiction which all parties admitted would be harmful, and, of course, the Federal Trade Commission has not yet spoken, but in view of the history of this legislation, I would be very much disappointed should the Federal Trade Commission take an unrealistic attitude at this time and not show a disposition to cooperate in removing the conflict in jurisdiction which all wished to avoid, and, most of all, I would be disappointed if the Commission indicated that any who now felt the conflict should be removed were undertaking to cast a reflection upon any agency of the Government.

Dr. SWAIN. Mr. Reece, your position today is exactly what it was in the middle thirties. You are trying to do what all of us thought at that time was the perfectly proper thing to do, and more or less logical. Here was the Food and Drug Administration on this side dealing with labeling, and here was the Federal Trade Commission, which already had charge of the advertising, so far as it had to do with unfair competition.

I would like the record to show that the National Drug Trade Conference, which included every segment of the drug industry, was unanimously in favor of the Food, Drug, and Cosmetics Act, and I don't think you would find there was much opposition to the Wheeler-Lea

bill as of that time, which is the measure under which the Federal Trade Commission exercises control over advertising. But, nevertheless, we are faced with this situation; a conflict has arisen, and you are correct in saying this thing may be embarrassing to the Federal Trade Commission and the FDA, but, as a matter of fact, the public is the victim of this conflict, and the hands of the Food and Drug Administration, in dealing with the very vital matters of labeling, are tied.

Mr. REECE. Those of us who were in a position of responsibility before are now confronted with the fact which we were then charged our action would give rise to.

Dr. SWAIN. Well, that may be a realistic view of the thing.

Mr. REECE. And the conflict, in fact, was not removed, when we thought it had been removed—due to the unexpected interpretation by the courts.

Dr. SWAIN. I think, however, after having studied the matter over very carefully, and with no desire on earth except to see that the original purposes are carried out, I think the language of your act will in very large degree, and maybe totally, meet the situation. At any rate, I give the Reece bill my very earnest support, and I hope it will be finally passed by the Congress.

Mr. RABIN. Dr. Swain, I can't go along with you on your grand-jury analogy. In most instances it doesn't hear the other side. You won't say that the Federal Trade Commission does not hear the respondent?

Dr. SWAIN. No. My point is—maybe the grand jury analogy may be overstressed—but I do think, in this respect the grand jury indicts if substantial evidence is collected and the issues are tried in court. The Federal Trade Commission may or may not predicate its conclusions on a preponderance of the evidence, but it has got some substantial evidence—

Mr. RABIN. I understand that the rule is that the appellate court does not apply the rule of preponderance of evidence, but there has been nothing testified to here to indicate that the Federal Trade Commission does not use the fair preponderance of evidence rule. In fact, I know of no other rule it could use.

Dr. SWAIN. I am not in any sense saying they do not use the rule you refer to.

Mr. RABIN. It is the only rule it can use.

Dr. SWAIN. What I am saying is, whether or not evidence qualifies under the rule is clearly a matter for the Commission, because the court on appeal cannot weigh, measure, assay, and evaluate. So it does come down finally to the fact that the Commission is the judge of whether or not it lives up to a rule such as you have stated. Don't you think that is true?

Mr. RABIN. I want to get it clear. You were discussing the rule on review. You were not discussing the rule as applied by the Commission in making a finding. Because, as I understand, the Commission does give the respondent an opportunity to come in and make a statement. I know of no rule, and there has been no evidence presented here, that indicates the Commission decides the issue by any other rule than that of fair preponderance, after weighing the evidence given by both sides.

Dr. SWAIN. I understand that is true.

Mr. RABIN. I understand that the court cannot review that. That is what you are discussing now.

Dr. SWAIN. That is what I am discussing. The court cannot review that, and the Commission itself is the judge of whether or not it is living up to its rule.

Mr. RABIN. Of course that is the issue we are discussing.

Dr. SWAIN. Yes.

Mr. REECE. With reference to the question that has been raised as to whether H. R. 2390 gives the court adequate authority to modify an order, a suggestion for a further change which applies to the act in general has been made, and I would like to read it so as to have it in the record for the convenience of the committee if it should care to consider it.

It is in subsection (d) of section 5 of the Federal Trade Act, about the middle of subparagraph (d), after the word "opinion" insert "based upon a preponderance of all the evidence received during the hearing."

I am merely putting that in the record so that it will be there for the convenience of the committee.

Also I received a copy of a brief which was submitted by Parke, Austin & Lipscomb, Inc., of New York, which deals with what has been referred to in this hearing as the Smithsonian Institution case. With the permission of the committee, I will submit that as part of the record.

Mr. RABIN. It will be received.

(The brief referred to is as follows:)

MEMORANDUM IN SUPPORT OF H. R. 2390 FILED BEFORE THE HOUSE SUBCOMMITTEE ON INTERSTATE AND FOREIGN COMMERCE BY PARKE, AUSTIN & LIPSCOMB, INC.

Our interest in the enactment of the Reece bill is not confined to the specific reforms which it proposes. Our interest runs to the fundamental principles on which the bill is grounded. We feel very deeply that for the full enjoyment of the constitutional guarantees of due process of law, the doors of the courts must always be kept open to all the citizens—not for the perfunctory examination of a record or the "rubber stamping" of the actions of an inferior tribunal, but for a real adjudication of the merits of the case presented.

We have no disposition to seek to reform the Federal Trade Commission or to criticize the Federal courts. We are, however, conscious of the inequities which have developed in Federal Trade Commission proceedings and the inadequacy of the court review of these proceedings.

We became acutely aware of this situation in a case which we had before the Commission. This case is reported as *Parke, Austin & Lipscomb, Inc. et al. v. Federal Trade Commission* ((C. C. A. 2, 1944), 142 Fed. (2d) 437).

In 1926, we entered into a contract with the Smithsonian Institution of Washington, D. C., whereby we agreed to form a subsidiary corporation to publish and sell a set of books to be written and edited by the scholars of the institution. It was agreed that the institution was to receive a royalty of 10 percent on the books. We placed in escrow a quarter of a million dollars to insure the proper preparation and distribution of the books.

A member of the Board of Regents of the Institution requested that we adopt the name "Smithsonian Institution Series, Inc." for the subsidiary corporation, which we did. His reasons for suggesting this name were to indicate by the name that there was a relationship between the Institution and the publisher and at the same time to limit us to the manufacture and distribution of books issued by the Institution and designed to make its resources more readily available to the American people, as a "pocket edition of the Institution in all its activities."

In 1932 they completed their first manuscript and we published a 13-volume work comprising the Smithsonian Scientific Series. We employed a staff of salesmen for the express purpose of distributing this set of books. We took every known precaution to prevent any misrepresentation of the books to the public. We checked and approved all prepared sales talks and when a salesman deviated from the truth in presenting the books he was immediately disciplined and usually discharged. In every instance where a customer complained that he bought the books because of a misrepresentation of a salesman we immediately canceled the contract of purchase and refunded all money that had been paid.

In 1937, the Federal Trade Commission made an investigation of our methods of publishing and distributing the Smithsonian Scientific Series and completely exonerated us of any wrongdoing. In its correspondence, the Commission said it was closing its files "without prejudice to the right of the Commission to reinstate the matter if conditions should warrant." We did not change our trade practices in any particular, yet the Commission saw fit to reopen the case and file a complaint against us.

The investigation was conducted by representatives of the Commission. The Commission was obviously convinced that there had been a violation of the act, else it would not have issued its complaint. The Commission was represented at the hearings by its attorneys who prosecuted the case on its behalf, and the hearings were presided over by a trial examiner who was also an employee and representative of the Commission. After all the testimony was taken, the case was presented to the Commission and a cease-and-desist order was issued which enjoined us, among other things, from "using the words 'Smithsonian Institution' in their corporate name or in any other connection to designate a commercial enterprise which in fact is not a part of or directly connected with the Institution in Washington." From that order we appealed to the circuit court of appeals, which dismissed our petition for a review and modification of the order and directed that the order be enforced.

The court apparently reached its decision with reluctance, for it said (p. 441):

The petitioners are standing upon much firmer ground when they insist that this paragraph in the order is needlessly severe in its sweeping requirement that the words "Smithsonian Institution" must be eliminated from the corporate name of petitioner Smithsonian Institution Series, Inc.

There may well be some alternative remedy less drastic but adequately effective which might satisfy the requirements of fairness and should be adopted. On this record, however, we cannot be sure that the Commission has abused its discretion in this respect, and only in that event should we interfere with its action.

Circuit Judge Swan wrote a concurring opinion in which he said:

In my opinion paragraph (5) of the Commission's order, which forbids the use of the words "Smithsonian Institution" in respondent's trade or corporate name, is unnecessarily drastic. Until recently this court would have regarded itself as competent to modify an order which imposed a restraint broader than the necessities of the case required, as was done in *Federal Trade Com. v. Royal Milling Co.* (288 U. S. 212, 218, 53 S. Ct. 335, 77 L. ed. 706) and *Bear Mill Mfg. Co. v. Federal Trade Com.* (2 Cir. 98 F. (2d) 67, 69). But in *Herzfeld v. Federal Trade Commission* (140 F. (2d) 207) we held that later decisions of the Supreme Court had in effect overruled the doctrine of the Royal Milling case, and that the court is now forbidden to disturb that measure of relief which the Commission thinks necessary to protect against unfair methods of competition. Only because I feel constrained to follow the Herzfeld decision regardless of my personal views, am I willing to concur in affirming paragraph (5) of the order.

From our own experience the need for the Reece bill is obvious. We do not think it consistent with our American system of law for an appellate court to be placed in the position of saying, as Judge Swan did, "Until recently this court would have regarded itself as competent to modify an order which imposed a restraint broader than the necessities of the case required." * * *

To speak of court review is hollow indeed if upon such review the court says in effect that the order is too broad but it is not competent to modify it. The reason for providing machinery for an appeal to the courts is so that the courts can exercise some restraint over the administrative agencies. To do otherwise is to sanction administrative absolutism in its worst form.

(An address entitled "The Reece Bill—H. R. 2390"—submitted by Dr. Robert L. Swain, is as follows:)

THE REECE BILL—(H. R. 2390)—AN APPROACH TO THE REINSTATEMENT OF BASIC PRINCIPLES OF AMERICAN LAW INTO THE PROCEDURE OF THE FEDERAL TRADE COMMISSION

(By Dr. Robert L. Swain)

On January 1, 1937, the late President Roosevelt, in transmitting to Congress the report of his Committee on Administrative Management, made the following comment:

"I have examined this report carefully and thoughtfully, and am convinced that it is a great document of permanent importance. * * * The practice of creating independent regulatory commissions, who perform administrative work in addition to judicial work, threatens to develop a 'fourth' branch of the Government for which there is no sanction in the Constitution."

This is tantamount to say that administrative agencies were not visualized by the founding fathers, and hence may not of themselves conform to the system of checks and balances which found expression in the division of the Government into the legislative, executive, and judicial departments.

Also, the mere fact the administrative agencies are not provided for in the Constitution would seem a sufficient admonition upon the Congress, the Executive, and the courts to see to it that they were hedged about with every necessary safeguard. These safeguards have been largely ignored, and this is the chief reason why the proper conduct of administrative agencies presents a grave issue to the American people.

Now, it must be agreed that the relatively simple governmental problems which confronted the Constitutional Convention have become tremendously expanded, inordinately complicated, and intricate beyond words. It is highly probable that many of the most important governmental functions could not be performed today were it not for administrative agencies. This thought is well crystallized in an address by Elihu Root, delivered in 1916.

Said Mr. Root:

"There is one special field of law development which has manifestly become inevitable. We are entering upon the creation of a body of administrative law quite different in its machinery, its remedies, and its necessary safeguards from the old methods of regulation by specific statutes enforced by the courts. As any community passes from simple to complex conditions the only way in which government can deal with the increased burdens thrown upon it is by the delegation of power to be exercised in detail by subordinate agents, subject to the control of general directions prescribed by superior authority. The necessities of our situation have already led to an extensive employment of that method. The Interstate Commerce Commission, the State public service commissions, the Federal Trade Commission, the powers of the Federal Reserve Board, the health departments of the States, and many other supervisory offices and agencies are familiar illustrations.

ADMINISTRATIVE AGENCIES NECESSARY

"Before these agencies the old doctrine prohibiting the delegation of legislative power has virtually retired from the field and given up the fight. There can be no withdrawal from these experiments. We shall go on; we shall expand them, whether we approve theoretically or not, because such agencies furnish protection to rights and obstacles to wrongdoing which under our new social and industrial conditions cannot be practically accomplished by the old and simple procedure of legislatures and courts as in the last generation."

But Mr. Root, who was thoroughly grounded in the basic purposes and principles of constitutional law, was fearful that in the development of administrative agencies, rights and privileges granted by the Constitution might be overlooked or impaired. He saw the danger inherent in the growth and expansion of administrative bodies. He was apprehensive lest they would become governments within the government, and hence beyond the control of the legislative, executive, and judicial branches of the government.

While admitting that administrative agencies had become utterly essential to the governmental process, Mr. Root foresaw that this particular type of regulatory activity must be held in bounds if constitutional government was to con-

tinue. Mr. Root's words on this basic point take on a truly prophetic significance:

"Yet the powers that are committed to these regulating agencies, and which they must have to do their work carry with them great and dangerous opportunities for oppression and wrong. If we are to continue a government of limited powers these agencies of regulation must themselves be regulated. The limits of their power over the citizen must be fixed and determined. The rights of the citizen against them must be made plain."

The same apprehension exists among thoughtful students of contemporary government. In its explanatory statement accompanying the text of its proposed Federal Procedure Act the Special Committee on Administrative Law of the American Bar Association expressed itself as follows:

"So long as the Federal administrative system is not defined and placed within a system of law, administrative justice is a loophole through which civil rights and constitutional guarantees may be frittered away. The American people and their Congress are therefore confronted with the problem of maintaining the American system by appropriate legislation which will preserve constitutional rights and guarantees."

Just recently, Dr. Rufus D. Smith, acting dean of the New York University School of Retailing, in discussing the impact of certain governmental activities upon business practices, declared that "* * * America must learn to set adequate safeguards of control over our present administrative agencies.

"We are going to find, I believe, that the major problem of American democracy over the next few decades will center in this vast administrative organization and its complex impact on the life of America."

WALTER-LOGAN BILL PASSED

The attitude of Congress to the problems inherent in the growth and expansion of administrative agencies and particularly their tendency to consider themselves beyond legislative control, is summed up in the report approving the Walter-Logan bill, later passed by Congress:

"The modern-day problems of government are entirely too technical to be performed in many cases by the untrained, and hence it is not possible today to emulate the practice in the comparatively simple days of President Jackson, discharge all employees in responsible administrative positions and turn the machinery of law administration over to a newly appointed group of officials freshly drawn from the people. In order to secure and retain the services of competent people to man the administrative agencies of government, we have been compelled to establish a career service under civil-service laws, but there is no gainsaying the fact that with competency and long tenure of office we also secure employees who tend in some cases to become contemptuous of both the Congress and the courts; disregardful of the rights of the governed; and for lack of sufficient legal control over them a few develop Messiah complexes. They honestly and fervently believe that their mission in life is to at least reform the United States regardless of the terms of the statutes, the Constitution, or anything else."

Now, the Walter-Logan bill was an earnest, thoughtful attempt upon the part of Congress to meet a situation which it looked upon as inherently detrimental to our system of constitutional government. The provisions of the bill were thoroughly debated, public hearings were held, and every effort made to meet the issue in a straightforward, conscientious manner.

VETOED BY THE PRESIDENT

As is well known, President Roosevelt vetoed the bill. Said the President:

"Notwithstanding recognition of the necessary character of administrative agencies by many lawyers, jurists, educators, administrators, and the more progressive bar associations, a large part of the legal profession has never reconciled itself to the existence of the administrative tribunal. * * * For years, such lawyers have led a persistent fight against the administrative tribunal. * * *

"Great interests, therefore, which desire to escape regulation rightly see that if they can strike at the heart of modern reform by sterilizing the administrative tribunal which administers them, they will have effectively destroyed the reform itself.

"The bill that is now before me is one of the repeated efforts by a combination of lawyers who desire to have all processes of government conducted through lawsuits, and of interests which desire to escape regulation."

It is no unfair criticism to state that the views here expressed by the late President were more or less typical of his attitude toward business and its problems in those days.

While the administrative agencies have in many important respects proved their value, they have, nevertheless, confronted the American people with some highly significant questions.

For instance, how can civil rights be safeguarded and protected under the growing weight of administrative procedure? Can basic civil rights be safely left to administrative agencies necessarily controlled and directed by the prosecution complex?

Is it prudent to permit the Government to become a series of governments within the Government, with the courts closed to those made subject to their administrative rules, regulations, and disciplinary actions?

Aren't we, the people, faced with deciding as a matter of vital American law, whether we can justify clothing administrative agencies with judicial immunity? Put another way, should not free, complete, and unobstructed access to the courts be the inalienable right of every citizen?

In spite of the searching character of these questions, we must admit that under the law, as now interpreted by the Supreme Court, administrative agencies have for the most part been made self-contained, self-sufficient, and insulated against judicial review in any practical or fair-minded meaning of the term.

In fact, under the law, as now interpreted by the highest Court, appeal from many of the administrative agencies is an empty gesture. At the present time—and this applies with special force to the actions of the Federal Trade Commission—the courts are virtually rubber stamps, restricted in their review of the sufficiency of the evidence or the appropriateness of the remedy. In fact, the administrative agencies have been made so completely supreme that important governmental officials are themselves crying out against the situation.

No one has phrased the issue more dramatically than did Lindsay C. Warren, Comptroller General of the United States, in a recent statement before the Senate Banking and Currency Committee:

"This thing called 'government' has reached such gargantuan proportions that it is sprawled all over the lot. It has become greater than Congress, its creator, and at times it arrogantly snaps its fingers in the face of Congress.

"The most necessary thing that I know of today along governmental lines is a thoroughgoing reorganization of the executive branch of the Government. It should be done scientifically, but once the decision is made, then a bush ax or a meat cleaver should be used. The only way to reorganize is to reorganize. It calls for great courage. Duplications and overlapping are widely prevalent, and untold millions could be saved and efficiency increased to a high degree. Of course, there would be loud yelps and snarls, but that is always true when powers are curbed, consolidations made, or appropriations reduced or discontinued."

COURTS POWERLESS TO INTERFERE

The seriousness of this situation is to be found in status given by the Supreme Court to the War Labor Board, the Federal Power Commission, and to other agencies of recent origin. In the highly critical field of management-labor relations the highest court has held that the decisions of the War Labor Board are not subject to judicial review. Even though vast economic and social rights are involved, the courts are forbidden to intrude just to see that justice is done.

In a recent case in which the authority of the Federal Power Commission was the subject under consideration, the Supreme Court held that the courts may not interfere. Here vast property rights are involved, the power to make rates is the power to destroy, but in spite of all this, the courts of justice must keep hands off.

The opinion of the Supreme Court was irksome to Mr. Justice Jackson that, in his dissenting opinion, he expressed himself in these direct, challenging words:

"If we are to hold a rate is reasonable, just because the Commission has said it was reasonable, review becomes a costly, time-consuming pageant of no practical value to anyone." (*Federal Power Commission v. Hope Natural Gas Company*, January 3, 1944.)

To claim that making the War Labor Board and the Federal Power Commission immune from judicial review is safe government and true democracy seems to me to make a mockery of the terms.

VAST FTC AUTHORITY

Now, all the criticism which can be and has been hurled at administrative agencies can with equal, if indeed not greater force, be leveled against the Federal Trade Commission. In fact, we of the drug industry are much more concerned with the authority and methods of operation of the FTC than of most administrative agencies. The FTC Act was passed in 1914, and the mere fact that it was virtually the first agency of its kind is the only justification for the broad, sweeping authority given it.

It is well to bear in mind constantly that under the FTC Act, the Commission's findings of fact are conclusive, if supported by evidence. It is noteworthy that the word "evidence" is not modified or qualified in any form. The courts construe the requirement to be "substantial evidence" but that is more technical than real and the courts uphold the Commission if there is an evidence to support its findings.

The Wheeler-Lea Act, which amended the FTC law to expand the Commission's jurisdiction over advertising, brought forward with its greater powers the old immunity to effective court review contained in the basic act of 1914. In other words, even though there may be deep-rooted, honest, irreconcilable differences of medical opinion with respect to the basic facts set forth in an advertisement, the Commission is empowered to make conclusive findings of fact. Medical men may differ, but such differences do not deter the Commission from actually deciding what is the correct medical opinion on the points involved.

So sharply limited are the powers of the courts when reviewing the FTC cases that they must uphold the Commission, even though the courts, who are by far the most expert in evaluating evidence, are convinced that the Commission has erred.

This was emphasized in the recent case of *Indiana Quartered Oak Company v. Federal Trade Commission* (26 Fed. (2nd) 310), in which the court said:

"I reluctantly concur in the result because the Commission has made findings of deception of the public, which there is some evidence to support, though in my opinion it is greatly outweighed by contrary evidence * * *. Interference with such commercial usage does not seem to me justifiable, but in view of the Commission's findings, the court is powerless."

At this point, let us ask, has not the administration of justice become a sorry spectacle when the courts, in cases such as these, admit they are powerless to meet the situation?

The attitude of the Supreme Court, when considering appeals from FTC decisions, is well set forth in the *Algoma Lumber Company case* (291 U. S. 67) in which the court said:

"The findings of the Commission as to facts, if supported by testimony, shall be conclusive. The Court of Appeals though professing adherence to this mandate, honored it, we think, with lip service only. In form, the court determined that the finding of unfair competition had no support whatever. In fact, what the court did was to make its own appraisal of the testimony, picking and choosing for itself among uncertain and conflicting inferences."

So that there can be no doubt as to its position, the Supreme Court, in the *Standard Education Society case* (302 U. S. 112) made the following forthright statement:

"The courts do not have a right to ignore the plain mandate of the statute which makes the findings of the Commission conclusive as to the facts if supported by testimony. The courts cannot pick and choose bits of evidence to make findings of fact contrary to the findings of the Commission."

COMPLAINANT, PROSECUTOR, JUDGE, AND JURY

Now, as a practical matter, what does all of this mean? In the first place, as the courts have pointed out, and as many an American business firm has found out, to its peril, the Commission simultaneously carries on as complainant, judge, jury, and counsel. It decides that a citizen should be proceeded against, it investigates, files its complaint, prosecutes the case, decides it and renders judgment.

To emphasize the significance of this situation, let me ask if substantial justice would always be assured if the prosecuting attorney were permitted to decide the case. As things now stand, the Commission can, and as a practical matter does accept the evidence best suited to its needs. A manufacturer, forced to defend his actions before the FTC, may match, and indeed, overmatch the Com-

mission's witnesses in every basic respect, and yet the Commission can decide the case on the basis of the testimony offered by its side.

It seems to me a matter of plain common sense that neither the FTC nor any other governmental agency should function as complainant, prosecutor, judge, and jury. No agency is wise enough, tolerant enough, or sufficiently well balanced to properly administer justice on any such water-tight basis. But not only does the Commission function as complainant, prosecutor, judge, and jury, but for all purposes and effects it is practically a law unto itself. Appeal from its decisions is of little or no value.

If we contrast the basic procedure of the Federal Trade Commission with that of the Food and Drug Administration, the uncontrolled authority of the Commission stands out in bold relief. The FDA, in the enforcement of the Food, Drug, and Cosmetic Act, has no power to issue orders, stipulations, or to make final decrees of any kind. Once it becomes necessary to try a case, FDA and the defendant appear in a court of law where the evidence on both sides is fully presented, and the case is tried in conformity with established rules of judicial procedure.

FDA-FTC BASIC DIFFERENCES

Under the FTC law the Commission, as the courts have taken pains to point out, serves as "complainant, judge, jury, and counsel" (*John Bene v. F. T. C.*, 229 Fed. 468). Under the Food, Drug, and Cosmetic Act, all issues of fact are determined in open court.

And will anyone contend that the Food and Drug Administration has not been fully as effective as the Federal Trade Commission in the performance of its duly delegated tasks? As a matter of fact, can the enforcement record of FDA be matched by any other agency of the Federal Government? Does not the record of constructive accomplishment of FDA show conclusively that the water-tight powers of FTC to decide what the evidence is, is not necessary to the effectuation of congressional policy or the realization of governmental objectives?

Now, this brings us to a consideration of the Reece bill, which was introduced in the House by the Honorable B. Carroll Reece, of Tennessee, and is identified as H. R. 2390.

The principal purpose of the Reece bill, in the plainest English, is to require the Commission to base its rulings on a preponderance of the evidence. It would permit a defendant to come into court for a full, complete, and impartial evaluation of the evidence. The complete record of the case would be reviewed and the court would determine whether or not the Commission had predicated its conclusions upon the preponderance of the evidence. The Reece bill is limited to minimizing the hazards and removing the booby traps inherent in prevailing Federal Trade Commission procedure.

That the passage of the Reece bill is highly desirable seems to me pretty well set forth in the statement which Mr. Reece made to the House of Representatives recently (Congressional Record, p. A1117, March 6, 1945). In his statement Mr. Reece made it clear that, "As the law is now, the scope of judicial review of the Commission's orders to cease and desist is so narrow as to afford hardly any relief at all. In an increasing number of cases the courts are declaring their impotence to review the findings of fact or the application of the remedy—or to prevent an unauthorized proceeding."

To drive home the point, Mr. Reece declares that the "appellate courts are obliged to sustain its decisions in spite of the fact that the weight of the evidence may be strongly to the contrary. The courts need read only one side of the case, and, if they find any evidence there, the administrative action is to be sustained and the record to the contrary ignored."

"The bill would cure this. It would enable the courts to examine the evidence on behalf of the respondent and to assure the decision of these cases according to the weight of the evidence."

Emphasizing the peculiar qualities of the Commission's authority, Mr. Reece further declares that "the nature of the Commission's proceedings is such as to make it highly appropriate for the courts to review the whole record of the evidence upon which the Commission has acted. Commission cases involve decision on pure questions of fact—questions peculiarly within the province of the courts. By empowering the courts to review the facts, the amendment draws upon the fundamental offices and the historical experience of the judiciary and operates to separate, in a substantial degree, the prosecution and judicial functions which, as the law now stands, are combined in the Commission."

It must be made clear that the basic purpose of the Reece bill is to reinstate sound principles of American law into FTC procedure. Should the Reece bill be passed, the defendant in FTC cases would be given his day in court in the proper use of the term. It would do away with the heads-I-win-tails-you-lose brand of administrative justice. Not only would it require the Commission to predicate its action upon a preponderance of evidence, but it would open the courts to every defendant who sought a fair-minded, comprehensive, and searching review of the order with which the Commission had confronted him.

REVIEW ESSENTIAL TO CIVIC RIGHTS

Now, in making these observations, I do not mean to assert that the FTC has not been a highly beneficial agency of Government. It has much constructive accomplishment to its credit. It has substantially curtailed unfair competition, and it has in general raised the moral tone of many business practices. It has exercised a salutary influence upon the advertising of drugs and medicines and cosmetics, and has fashioned the outlook of the drug and cosmetic industries to a higher pattern than had once been the case.

But its record—which I admit is rather imposing—does not justify the one-sided procedure which it follows, nor the lop-sided justice which frequently results. While the Commission must, as a practical matter, institute the prosecution and collect the evidence, there is certainly grave doubt as to the propriety of its determining the verdict.

Certainly if it is to be permitted to determine the verdict which may, and frequently does, involve basic civil rights, then surely every fact leading up to the verdict should be subject to judicial investigation and review.

As I see the situation, the passage of the Reece bill is absolutely essential to the stability and security of important segments of the drug industry. It does not require much stretch of the imagination to see that under the present set-up the Commission could place the industry in a strait-jacket, insofar as many of its necessary activities are concerned.

If the Commission is to continue as the sole judge of the facts and as the sole expositor of the law, it follows that the industry must conform to whatever policies the Commission may feel inclined to dictate.

The Commission may announce its own conception of professional rectitude, its own brand of advertising morality, its own pattern of business conduct. In other words, it is possible for the Commission to regiment these segments of the drug industry to any degree and to any manner which it arbitrarily conceives.

Now, obviously, all the assertions I have made with respect to the arbitrary power of the Federal Trade Commission over the drug industry applies in full force an defect to any industry. The Commission, as the law now reads, may remake, revise, or refashion any business through the simple device of declaring that certain of its practices constitute unfair competition.

Of course, we can expect the Commission to fight the bill, and we can expect it to make the best fight possible. Agencies never voluntarily give up authority. As Comptroller General Warren remarked, "There are always loud yelps and snarls when administrative powers are curbed."

Not only should the Reece bill be passed because of the specific purposes it serves but success with this one piece of legislation will give encouragement and impetus to the efforts of all serious-minded citizens who are convinced that administrative agencies must be held to sharply defined, limited powers, and that the right to judicial review of administrative actions is an inalienable right of every American.

Mr. RABIN. Mr. Frates.

STATEMENT OF GEORGE H. FRATES, REPRESENTING THE NATIONAL ASSOCIATION OF RETAIL DRUGGISTS

Mr. FRATES. Mr. Chairman and gentlemen of the committee, my name is George H. Frates. I am the Washington representative of the National Association of Retail Druggists, an organization composed of 30,000 independent retail pharmacists practicing their profession in every State of the Union and in the District of Columbia.

Its membership also includes State and local pharmaceutical associations in every part of the United States.

We are present today to offer our support to the Honorable Carroll Reece in behalf of H. R. 2390.

As retail druggists, we are constantly concerned about the Federal Trade Commission's and the Food and Drug Administration's rulings.

Under the provisions of the law, as it now stands, the Federal Trade Commission may issue a cease-and-desist order against a manufacturer of proprietary medicine because of predetermined alleged misstatements in the advertising of a particular product. Conversely, the Food and Drug Administration is concerned with the labeling of a given product and sits in judgment and governs the purity and efficaciousness of any medicine sold in interstate commerce. Thus, we have dual authority endorsed by two separate Federal agencies in respect to the sale of medicine.

Under these circumstances, it is difficult for a manufacturer to know or understand his rights and privileges. If his label has passed the scrutiny of the Food and Drug Administration, he might find that the Federal Trade Commission will object to his advertising. The irksome overlapping of jurisdiction between the Federal Trade Commission and the Food and Drug Administration is complicated to say the least.

In our opinion, if H. R. 2390 is passed, it will place all labeling control exclusively under the Food and Drug Administration. It will give the circuit court of appeals power to review any Federal Trade Commission ruling, particularly as to determining whether or not "preponderance of evidence" supports the Federal Trade Commission's position. Likewise, it places a ceiling of \$10,000 on penalties for violating FTC orders.

As the law now stands, astronomical figures could be assessed against any violator. For example, each issue of a newspaper carrying an advertisement declared to be in violation and having a circulation of 250,000 could be used as an instrument in penalizing a manufacturer for each separate issue of the newspaper carrying the advertisement in question.

Whether due to usurpation, misinterpretation, or actual legal authority, the overlapping jurisdiction over labeling should cease.

Our Constitution provides that we shall have Government composed of counterbalancing legislative, executive, and judicial departments.

The purpose and intent of H. R. 2390, as now written, is that some measure of this counterbalancing be restored to at least one bureau that many of us believe exercises all three. If this be true, then the cure rests with the legislative branch of the Government. It is within the power of the Congress to define the powers of any bureau it creates or permits to function. We believe that most of the judiciary will welcome such an act. Many who hold bureau jobs will, logically, oppose it on "principle."

Reference is again made to false advertisement. The term means an advertisement other than labeling, which is misleading in a material respect; and in determining whether an advertisement is misleading, there shall be taken into account not only representations made or suggested by statement, word, design, device, sound, or any

combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations.

H. R. 2390 is proposed with a view to overcoming the conflict in the jurisdiction of the two Federal agencies which affect the regulation of commerce in food, drugs, devices, and cosmetics.

The Federal Food, Drug, and Cosmetic Act is administered by the Food and Drug Administration of the Federal Security Agency. It applies to the composition and labeling of foods, drugs, and cosmetics and therapeutic devices. The Federal Trade Commission administers the Federal Trade Commission Act. That act is designed to prevent the false advertisement of foods, drugs, cosmetics, and therapeutic devices.

We believe that the intention of Congress should be to formulate a pattern of regulation which would operate smoothly as a whole without conflict between the agencies administering the two laws. Conflict, however, has developed and it has grown largely out of the administration of the Federal Trade Commission Act.

The Wheeler-Lea Act expressly excludes labeling from the definition of the term "false advertisement." This exclusion was to insure again dual administration as to the contents of the labeling of these products because the regulation of the labeling was made the subject of the Federal Food, Drug, and Cosmetic Act.

The nature of the proceedings with respect to advertising cases is such as to make it quite appropriate for the courts to review the evidence upon which the Commission has acted. The advertising cases involved decision on pure questions of fact—questions peculiarly within the province of the court.

The National Association of Retail Druggists believes that H. R. 2390 is a good bill and that its enactment into law will clarify the misunderstanding and confusion now existing because of conflicting decisions often rendered by the two governmental agencies involved.

I thank you.

(The following was submitted for the record:)

STATEMENT BY ROBERT E. CANFIELD, OF WISE, CORLETT & CANFIELD, ATTORNEYS AT LAW, NEW YORK CITY

My name is Robert E. Canfield. I reside at Port Washington, N. Y.

I am a practicing lawyer with the firm of Wise, Corlett & Canfield, with offices at 122 East Forty-second Street, New York City, and have represented or participated in the defense of many respondents in a number of proceedings before the Federal Trade Commission. My practice also involves counsel and advice to several trade associations and industrial groups.

I appear in support of H. R. 2390, sometimes referred to as the Reece bill, which would amend the Federal Trade Commission Act in several respects and, while I am entirely sympathetic to all of the amendments suggested, my principal interest and concern is with the proposal to amend section 5 (c) of the act so as to require a preponderance of evidence to support a finding of fact by the Commission.

May I say, also, that I am not representing or speaking for any trade association or organization, although two of them with whom I have discussed the matter, American Paper and Pulp Association and Tag Manufacturers Institute, have expressed approval of my making this statement and approved of the Reece bill. I have no doubt but that others, if consulted, would take a similar position. I am making this statement in my individual capacity as a citizen and as a member of a profession having close contact with the Federal Trade Commission Act and its administration. I also desire to emphasize that what I am about to say is in no way to be interpreted as a personal attack upon the Commission,

its members, its agents, or its employees, and, while I shall be somewhat critical when candor compels, my criticism is intended to be entirely impersonal and without rancor.

Of late years we have witnessed an enormous expansion in this country of what has come to be known as administrative law. Because of the complexity of modern life, the public needs, the exigencies of war, the genesis and growth of abuses of one kind or another, and various other reasons, we have been subjected to a degree of regulation of our individual affairs which was once unknown and undreamed of. Whether much of this regulation is necessary or desirable is a question upon which there is great difference of opinion which we need not here discuss. I believe, however, that no one will dispute the fact that such regulation as may be required or imposed should be reasonable in extent, justly and efficiently administered, and designed to achieve its purpose within the framework of our constitutional safeguards and established rules of law.

The Federal Trade Commission is one of our oldest administrative agencies in the regulation of trade and commerce. There was need for its creation, and in its comparatively long life it has served a variety of useful purposes. To do this it has been invested with wide powers of investigation and control, and these have been uniformly upheld by the courts. In the field which we are now considering it has issued countless orders against individuals and groups commanding them to cease and desist from methods and practices which it has found to be in violation, actual or threatened, of the antitrust laws or other statutes governing our trade and commerce at home and abroad. These orders, unless vacated or modified on review, are enforceable through the circuit courts of appeals and have the effect of an injunction obtained after a due trial of the issue in a court of equity.

Because of this it becomes important to examine the basis of any action taken by the Commission against the one or more respondents against whom proceedings are brought. As we all know, the Department of Justice brings many civil suits in equity to restrain violation of the Sherman Act. The Attorney General commences these actions when his preliminary investigation satisfies him that the law is being or is about to be violated. The United States is the complainant and the case is presented to and tried before a district judge who has no connection with any party. The complainant, as in any other case, has the burden of proof and is required to prove its case by a preponderance of credible evidence. The recognized rules of evidence apply and any hearsay or other incompetent evidence is rigidly excluded. If the proof for the complainant outweighs that of the defendant, an injunction issues. If the weight of the evidence is the other way, the complaint is dismissed, and the defendant goes his way. Such is the law of the land.

But consider the procedure before the Commission. Here the Commission, through its agents, makes a preliminary investigation. If the result appears to warrant further proceeding, the Commission issues its complaint against the supposed offenders who must then answer or submit to an order issued on their default. In principle, the procedure is the parallel to that of the Department of Justice in bringing a civil suit for injunction. In practice, however, it is quite different.

The complaint is issued by the Commission in accordance with the rules made by the Commission. It is not and need not be in the form of a pleading in equity. No demurrer lies against it. It is usually drawn in broad terms which includes conclusions both of fact and of law which could not be sustained in a suit. The respondents who must defend themselves against a broad charge of conspiracy to fix or manipulate prices or production cannot obtain any bill of particulars. Nor can they move to dismiss for any reason or take any effective steps to narrow the issues. All they can do is to admit or deny what appears in the complaint and proceed to hearing on the issues so raised.

In a court of equity the case is heard by a district judge who has no connection whatever with either party to the controversy. The evidence adduced must be competent, relevant, and material under the long-established rules of evidence. Hearsay, rumor, and speculation are barred. The trial is held in the district where one or more of the alleged conspirators resides or can be found and, once begun, is usually completed without a break.

In a case before the Commission, the trial is replaced by a series of hearings before an examiner who is, himself, a salaried employee of the Commission. He knows full well that his employer, the Commission, has investigated the case and has issued a complaint which would not have been issued had the Commission thought that there was no basis for the charges. Say what you like,

this fact alone is sufficient to create in the mind of the examiner an impression that the respondents are probably guilty. This has been demonstrated time and again by the tendency of the examiners to magnify everything offered by the Commission and minimize or ignore the evidence of the respondents. Illustrations of this will be given later. I have not the figures, but I would not hesitate to say that the dismissals of equity complaints by the courts overwhelmingly outnumber, in proportion, the reports of examiners favorable to respondents before the Commission. In short, the examiner is almost invariably what we sometimes call a "hanging judge" and, notwithstanding his desire to be impartial, he almost always is unconsciously biased in favor of his employer. This is not said with any animus against the examiner. It is merely a statement of a perfectly human trait as observed from experience.

The examiner is not bound by any formal rules of evidence. He may, and frequently does, admit hearsay—and sometimes even double or triple hearsay—rumor, gossip, speculation, and report.

For example, in a recent case the examiner admitted, over objection, as evidence of what transpired at a meeting, a letter from a person who did not attend stating that another person who also did not attend told him that he had talked to still another person who told him what yet another person had said at the meeting.

Thousands of letters and documents are permitted to encumber the record merely because they may contain some reference to a "price" or a "competitor" or an "understanding" notwithstanding that the context on its face negatives any connection with the issues. This, of course, results in a record and expense far beyond any reasonable or necessary scope and a corresponding handicap to any intelligent or effective review of the proceedings. The mere expense of an appeal is often a deterrent to an assertion of individual rights. The Commission, of course, cares nothing about this, since its disbursements are made from the public funds.

The hearings themselves may extend over a period of years and often held in an area covering the entire continent from the Atlantic to the Pacific. Here again the matter of expense is a serious one for the respondents whose counsel must attend every hearing wherever held but is of no concern to the Commission.

When these hearings are completed, the examiner prepares his report on the evidence. The law says that the findings of the Commission shall be conclusive if supported by evidence, and it is his business to find the evidence. The result is that he combs the enormous record, page by page and line by line, in search of anything which will support or can be made to support the claims of conspiracy exhibited in the complaint. He goes through every exhibit with the same care and the same purpose. He usually finds what he is looking for and, having done so, proceeds to sustain all of the charges made. It makes no difference what may be the evidence to the contrary—he can disregard it or disbelieve it. All he needs is some evidence and his objective is gained. Let me illustrate.

Some years ago, the Commission issued a complaint of price fixing against a number of manufacturers of book paper and their trade association for which I am counsel. One of the charges was that the respondents had, during the period of NRA, promulgated and published in printed form a set or code of trade customs by which all agreed to be bound in selling paper and which, it was claimed, tended to produce uniformity of prices and to restrain trade. It was further alleged that after the NRA had been abolished, these allegedly restrictive customs had continued to be observed by agreement among the respondents.

Now, everybody knows what a custom is. It is a voluntary rule of conduct which has been observed as a matter of habit since time immemorial and is universally followed as a matter of course. It is customary to raise one's hat to a lady; it used to be customary for a baker to sell 13 rolls as a "baker's dozen"; 6 percent was once the customary rate of interest, and so forth. Trade customs have existed since the beginning of recorded history. Contracts have been interpreted in their light. Everyone has taken them for granted and observed them as a matter of course. Exceptions have always been made to suit particular circumstances, but the customs have persisted and nobody has given them a second thought. Frequently, as in this case, they have been printed and issued in booklet form for convenient reference and for the information of all concerned. Neither before nor since the NRA has there been any agreement that they must be observed in any case.

The examiner in the book paper case was therefore hard put to it to find any evidence to support the Commission's charges that the respondents had agreed in this regard. But, as usual, he combed the record, and at last his patience was rewarded.

It was revealed that one witness had testified, in response to the usual leading questions, that after the NRA had been abolished, the industry's trade customs had continued to be observed "by common consent." Those three words are quoted, for they were used by the witness himself. Now, every custom the world has ever seen, in industry or elsewhere, has, from the beginning of time, been observed by "common consent." Without that, there could be no custom at all. None could even have genesis without it. What the witness was trying to say, of course, was that the old customs, as they had always been known and recognized as a matter of course, continued to be observed after the demise of the NRA simply as a matter of habit or common assumption. And he so testified to his meaning when interrogated on cross-examination. Moreover, as against the testimony of this one man, at least 20 others stated, under oath, that the trade customs were exactly what they purported to be—customs which had grown up with the industry from its earliest days, taken for granted by everyone and by implication made a part of every transaction unless specifically excepted in given cases. They further swore that nobody was or ever had been bound by them by any agreement or understanding or was compelled to adhere to them in any way. Every witness so testifying was a man of education and integrity, no contradiction was attempted, and there was no suggestion that they were not telling the truth. But nevertheless, in spite of the fact that the testimony, including that of the witness who used the term "common consent," was 100 percent against him, the examiner found and reported as a fact that the trade custom had been carried forward and observed by agreement after the protection of NRA had been removed. What court of equity of your acquaintance or mine would have made that finding on such a record? Let me illustrate further.

In a recent proceeding against the tag industry and its members, still pending before the Commission, an issue was raised with respect to the effect upon prices and competition of an open price reporting plan used by the respondents. In that case the evidence showed that every price involved in every transaction was publicly reported after the transaction had been fully closed. The plan operated on the principle employed by the stock and commodity exchanges throughout the country. Counsel for the Commission called two witnesses, identified as economists in the employ of the Commission, who claimed and were accorded the privilege of testifying as "experts." These gentlemen testified, in effect, that a price list, subject to change without notice, filed with the understanding that the seller could and would deviate from it whenever he felt like it, but that subject to such deviations, it would remain in effect until such time as he saw fit to change it, would have a tendency to stabilize future prices. Nothing in their testimony related to any system shown to have been employed by the respondents, and their cross-examination revealed that neither of them had made any study of the facts of the case nor had any knowledge at all of the tag industry or its operation. Opposed to them was the testimony of a nationally known economist, retained by the respondents, skilled in this field and who had made an exhaustive study of the tag industry and the manner in which it was and had been conducted. Commenting on the price-reporting system used by the respondents, he gave it as his considered opinion that it would improve the open, competitive character of the industry. There can be no question about the relative weight of testimony, yet the examiner in finding against the respondents, relied heavily on the Commission witnesses while utterly ignoring all testimony of respondents' witness to the contrary. In a court of equity, it is inconceivable that the Commission's witnesses would have been permitted to give any opinion evidence at all since it would have been utterly impossible for them to qualify.

These are merely two illustrations which in my own experience could be multiplied many times. But they show the trend of thought of the examiners and the bias to which respondents in these proceedings are constantly exposed. Of course, the examiner's report is merely advisory and is in no way binding upon the Commission, but who will pretend that the Commission which neither hears the witnesses nor observes their demeanor is not guided almost entirely by what the examiner says? True, we may file exceptions to the examiner's report and argue them to the Commission, but it is idle to suppose that the Commission, with

its enormous burden of work, can devote the time required to examine in detail all of these exceptions which, because of the laxity in the matter of evidence, must always be very numerous in any important case. Furthermore, to reject the report of the examiner is to disavow the work and conclusions of their own trusted agent, which they naturally would be anxious to avoid if possible.

The real vice of the situation represents a combination of two elements. The first is that the Commission acts as prosecutor, judge, and jury. Being one and the same, and being no more than human, the jury is anxious to give a verdict for the prosecutor and the judge wants so to instruct the jury as to permit them to convict. The second element is that, as the law is now written, the prosecution need not prove its case beyond a reasonable doubt nor even by a preponderance of the evidence. All it needs is "evidence" and conviction is assured beyond even the power of the courts to undo.

That the respondents must suffer under such procedure is self-evident. To say to a man that he must forthwith cease and desist from a practice which may be a principle factor in his business, and its success is a serious matter. He should not be so compelled unless it shall be established that he has in some way violated the law of the land or that he threatens to do so. It matters little to the victim that a court of equity would refuse to enjoin him from doing what he does if the Federal Trade Commission can order him to abandon a practice on the same evidence, or lack of it, which the court would reject as insufficient and where that evidence must be taken by the court on review to be conclusive if it exists at all. It does not seem unreasonable to observe that if the defendant is protected in court in a suit for an injunction, he should have the same protection as a respondent before the Commission which is judging its own proceeding in an effort to obtain exactly the same final result. That he who makes a charge must sustain the burden of proof has been a fundamental rule of justice in this country from the beginning, and it is impossible for me to understand why it should be flouted as it is by the so-called administrative tribunals.

Yet that is so. In case after case, the circuit courts of appeals and the Supreme Court of the United States have held consistently that it was the intent of the Congress to confer upon the Commission exclusively the power to weigh the evidence and find the facts. The courts have sustained the Commission wherever on the record there could be found any evidence beyond a mere suspicion or scintilla, regardless of the proof to the contrary. This they have sometimes done unwillingly, as witness Judge Swan's opinion in the case of *Federal Trade Commission v. Indiana Co.* (26 F. (2d) 340, 341), in which he says:

I reluctantly concur in the result, because the Commission has made findings of deception of the public, which there is some evidence to support, though in my opinion it is greatly outweighed by contrary evidence * * *. Interference with such commercial usage does not seem to me justifiable, but in view of the Commission's findings, the court is powerless.

Had the case in which Judge Swan so wrote been on appeal from a decree of injunction of the district court, there would have been no question of the power of the circuit court to review the weight of the evidence. Yet merely because the Commission had made its findings, the court was helpless. I find it impossible to believe, notwithstanding the interpretation given by the courts, that it was really the intent of Congress to make possible oppression and injustice through a proceeding before the Commission which would not be tolerated in a suit in court. Possibly it was felt originally that since the Trade Commission had no means of enforcement of its decrees other than what amounted to a retrieve of the issues before a court and subject to court rules and procedures, there was little danger. But since the recent amendments to the Trade Commission Act, the decrees of the Commission become in practical fact final injunctions backed by all the power of the Federal courts including fines and contempt proceedings. To invoke the powers of fine and imprisonment for violation of an injunction based on evidence which would not conceivably have resulted in an injunction if produced before any other agency of the Government, seems to me clearly to be repugnant to our American concept of justice and fair play.

What are the objections to this proposed amendment? Is it a reflection upon the Commission? I think not. Certainly if the district courts are subject to effective review of their findings and decisions, the Commission should claim no exempt status. Would it interfere with administrative process? I do not understand how it could. On the contrary, I would think that the necessity of proving a case by a fair preponderance of evidence would tend to discourage the present custom of cumbering the record with a mass of totally incompetent

and irrelevant "evidence" in the hope that by culling out selected portions here and there, both disconnected and out of context, some sort of straw-man case might be made. Furthermore, it is quite probable that the time of the Commission and its staff would not be wasted in instituting baseless proceedings which would have no reasonable prospect of success. Would it result in the escape of any guilty parties? Not unless we are now prepared to say that guilt need not be established by a fair preponderance of evidence, which I hope we are not. In short, I can conceive of no reasonable objection to this proposal which can be urged.

In my opinion this question of power of effective review of decisions of administrative bureaus is paramount. In addition to a refusal to review the weight of evidence, the courts have consistently declined to interfere with the remedial action prescribed by the Commission. An injunction may be modified and frequently is when its terms are too harsh. An order of the Commission is seldom altered in any way, although the courts have indicated many times that they felt the penalty imposed was too severe. This being so, it seems all the more to be desired that administrative decisions such as these should be subject to the same restraints as are imposed upon the judiciary. Since this is, at least in part, the object of this bill, I respectfully urge its enactment.

CONGRESS OF THE UNITED STATES,
COMMITTEE ON APPROPRIATIONS, HOUSE OF REPRESENTATIVES,
Washington, D. C., March 16, 1946.

CHAIRMAN, COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
House of Representatives, Washington, D. C.

MY DEAR MR. CHAIRMAN: I am in receipt of a communication from a large paper manufacturer in the district that I represent. He has a deep interest in the passage of H. R. 2390, and I am anxious to record myself as in favor of this measure.

It is my feeling that this proposed amendment of the Federal Trade Commission Act is wholly in the public interest and would go far in removing present injustices. As you know, it permits the appellate court to determine the weight of evidence and thereby review the Commission's findings.

I would appreciate your communicating this thought to the members of your committee.

Sincerely yours,

JAMES M. CURLEY.

Mr. RABIN. I understand that the witnesses who were called and were not present will appear at a later date. The committee will adjourn subject to the call of the Chair.

(Whereupon, at 11:45 a. m., the committee adjourned, subject to call.)

AMEND FEDERAL TRADE COMMISSION ACT

WEDNESDAY, FEBRUARY 27, 1946

HOUSE OF REPRESENTATIVES,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D. C.

The subcommittee reconvened at 10 a. m., Hon. George G. Sadowski, chairman of the subcommittee, presiding.

MR. SADOWSKI. The subcommittee will come to order.

We will proceed with the hearings on H. R. 2390. I believe the first witness for the morning is Mr. William Kelley, chief counsel of the Federal Trade Commission.

Before we proceed, I think that we ought to state that we will be unable to hold hearings this afternoon because we have this housing bill up for consideration under the 5-minute rule, and every one of us will be interested in being on the floor. Now, if there is anybody here who is from out of town and it will be inconvenient for them to come tomorrow, we would like to hear them this morning. Are any of the witnesses from out of town? If not, we will proceed according to the schedule that I have here.

State your name and position, please.

STATEMENT OF WILLIAM T. KELLEY, CHIEF COUNSEL, FEDERAL TRADE COMMISSION

MR. KELLEY. My name is William T. Kelley, chief counsel to the Federal Trade Commission. I have been chief counsel since 1934, and I have been with the Commission since it was organized in 1915.

This statement is addressed only to that portion of H. R. 2390 which provides that the findings of the Federal Trade Commission as to the facts shall be conclusive "if supported by the preponderance of the evidence." I shall divide my statement into two parts, as follows: First, what is the present state of the law regarding the status of the Commission's findings of fact in the appellate courts? And secondly, how has the present law on that subject operated in the light of a retrospective survey of the actual cases arising under it?

The present statutory provision is that the findings of the Commission as to the facts shall be conclusive "if supported by evidence." Prior to the Wheeler-Lea amendment of 1938 the only difference was that the word "testimony" was used instead of the word "evidence" and that had been the law since passage of the act in 1914. A number of statutes enacted prior to the Wheeler-Lea amendment

employed language similar to the present provision of the Federal Trade Commission Act. The National Labor Relations Act and the Securities Act of 1933 incorporated the language of the original Federal Trade Commission Act except that they substituted the word "evidence" for "testimony." The Federal Power Act and the Securities Exchange Act of 1934 refer to "substantial evidence."

All of these statutes have been construed as embodying the substantial evidence rule. The statutory language that "the findings of the Commission as to the facts, if supported by evidence, shall be conclusive" has been uniformly construed by the courts to refer to substantial evidence. This means substantial evidence in support of every essential fact.

The Supreme Court has declared that "substantial evidence is more than a mere scintilla" (*I. C. C. v. Jersey City*, 322 U. S. 503; *Rochester Telephone Co. v. U. S.*, 307 U. S. 125; *Consolidated Edison Co. v. N. L. R. B.*, 305 U. S. 197). It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. The rule of law that administrative findings are conclusive, if supported by substantial evidence, does not, so the Supreme Court has held, "go so far as to justify orders without a basis in evidence having rational probative force" (*ibid.* 230).

The question whether the evidence relied on is substantial is a question of law for the courts to determine and in reaching their conclusion they are at liberty to and do examine the whole record. The rule of law applicable to the court review of Federal Trade Commission findings as to the facts is: If capable men, acting reasonably, could have reached the same conclusion and made the same findings as did the Commission, then the courts will not disturb the Commission's judgment. The court will determine, however, upon the basis of the whole record whether reasonable minds could have reached the same conclusion as the Commission and if the courts think that they could not, they may set the Commission's findings aside.

The substantial evidence rule applied by the appellate courts in reviewing the Commission's findings closely approximates the rule developed out of their own experience by appellate courts in reviewing jury verdicts. It is the right of a jury to determine issues of fact. A well-established rule is that the jury is the trier of the facts, but the court may set aside a jury's verdict if the evidence supporting it is not substantial. The existence of some evidence or a scintilla of evidence supporting the verdict is not enough.

Substantial evidence, the Supreme Court has held, means more than a scintilla. It must do more than create a suspicion of the facts to be established. The Court said it means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." It is left to the jury to pass upon the credibility of witnesses and determine the weight of the evidence and to draw inferences from the evidence and the verdict will be sustained if it is grounded upon substantial evidence (*Galloway v. U. S.*, 319 U. S. 372; *N. L. R. B. v. Columbian Enameling Co.*, 306 U. S. 292).

MR. REECE. Would it interfere, Judge, to ask you a few questions?

MR. KELLEY. Surely you may.

MR. REECE. In the memorandum submitted to the committee in March of last year, the Commission said that the adoption of the pre-

ponderance rule would inevitably and materially increase the length of the record in the Commission's proceedings, and unduly prolong the trial. What is the significance of using that language in the report if that rule is now followed?

Mr. KELLEY. I am going to come to that at length, but I will say at the outset that I do not think the Commission can decide on any rule or upon any basis except the weight of the evidence and the preponderance of the evidence. It has never decided, and I challenge the statements made here that they decide otherwise. What the Commission meant in that report was that to adopt this amendment and give to the appellate court the right and power to de novo try the case on the facts and weigh the evidence would increase litigation, and I do not think it would be in the public interest, but I will come to that more at length, and Mr. Wooden, the next witness, will elaborate on that in some detail.

Court review of this Commission's findings is based exactly on the same principle. The substantial evidence rule applicable to jury verdicts is the rule governing review of findings of the Federal Trade Commission. A finding of the Federal Trade Commission unsupported by such evidence is beyond the power of the Commission to make, as it is contrary to law and would be set aside by the courts. It is the duty of the court to examine the whole record, to determine whether there was no evidence, a scintilla of evidence, or whether the evidence was substantial enough to base a reasonable judgment thereon.

In *Carlay Company v. Federal Trade Commission*, decided February 15, 1946, that is this month, the Circuit Court of Appeals for the Seventh Circuit correctly stated the substantial evidence rule as follows; and, I think it is the best definition that I ever found from any court, and here is the rule that that seventh circuit applies in reviewing Federal Trade Commission cases. In most of our very important cases, involving complex records, they go to the seventh circuit and the second circuit. The seventh circuit has a case before it that it is going to hear on the 16th of next month, involving 50,000 pages of testimony and several thousand exhibits, involving a whole industry, one of the most important cases that the Government has ever instituted under the anti-trust laws. This is the rule that that court applies in looking at our records on review:

Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind would accept as adequate to support a conclusion. It must be of such character as to afford a substantial basis of fact from which the fact in issue can be reasonably inferred. It excludes vague, uncertain or irrelevant matter. It implies a quality and character of proof which induces conviction and makes a lasting impression on reason (*Consolidated Edison Company v. National Labor Relations Board*, 305 U. S. 197; *National Labor Relations Board v. Columbian Enameling and Stamping Company*, 306 U. S. 292, 299; *National Labor Relations Board v. Thompson Products, Inc.*, 97 F. 2d 13, 15 (C. C. A. 6)). The rule of substantial evidence is one of fundamental importance and marks the dividing line between law and arbitrary power; and the requirement that a finding must be supported by substantial evidence—

and mind you, the court does not say some evidence or any evidence, but says:

substantial evidence does not go so far as to justify orders without a basis in evidence having rational, probative force (*Consolidated Edison Company v. National Labor Relations Board*, *supra*, *National Labor Relations Board v. Thompson Products*, *supra*).

That is the rule of the courts when they scrutinize our cases.

Mr. ROGERS. Will you differentiate between the substantial and the preponderance rule right there, and why you are opposed to the preponderance rule?

Mr. KELLEY. I will come to that. I can only say this: If there is any other rule that the Federal Trade Commission or any tribunal in this country can use in appraising the evidence and reaching a decision, except the weight of the evidence, the greater weight of the evidence and the preponderance of the evidence, I do not know it.

If the Federal Trade Commission, in reviewing these cases and coming to a finding of the facts and a determination of law violation, should reach a conclusion based upon anything other than the weight of the evidence or the preponderance of the evidence, then the hearing under that amendment is out of place; there should be impeachment.

Mr. ROGERS. Do you not believe that the preponderance-of-evidence rule would protect the respondents better?

Mr. KELLEY. The Commission uses the preponderance-of-the-evidence rule, the greater weight of the evidence. What other rule is there? No tribunal in this country from the justice of the peace to the Supreme Court of the United States can be intellectually honest if it arrives at a decision upon factual matters, upon anything except in its mind as to what constitutes the greater weight of the evidence and the preponderance of it. It is vital and it is fundamental, and the very minute that that line is crossed, the integrity of whatever tribunal that ever did it is impeached. This is a fundamental matter. I am going to endeavor here to prove to you that the Commission does not reach any decision upon any rule except the preponderance of the evidence, and I am going to endeavor to show to you that in every case, except maybe a few scattered ones, that you or any other tribunal would have to have reached the same conclusion. The Commission is protecting the public interest; it is not representing special interests. I am going to come to that in detail.

Mr. RABIN. Do you intend to say why you believe the appellate court should not use the same standard? I do not want you to do it now; you will, I presume.

Mr. KELLEY. The appellate court reviews these cases under this substantial evidence rule, as I have just read from the seventh circuit, in one of our own cases that it reviewed this month. Of course, the appellate court cannot weigh the evidence any more than it can weigh the evidence of a district judge, but as a matter at law it looks into the record and it finds that if it does not meet the test of the substantial evidence rule that it can set that finding or order aside, it is its duty to do it on the whole record, and I believe the courts have done a pretty good job. I think that they do it and do it honestly and meticulously.

I can find a few cases that I differ with the courts, I can find several that I would have come to a different conclusion of the Commission. In some cases, I do not think the order was harsh enough, and in a few cases I thought the order was too harsh. They dismissed a good many cases that I did not think ought to be dismissed, but that is neither here nor there. We are here on the question of whether they approach these matters on a basis of weight of the evidence and the preponderance of the evidence.

Mr. RABIN. Mr. Kelley, I understand you to say, and I am ready to accept it, that the Federal Trade Commission only decides on a fair preponderance of the evidence. There is, however, a difference between deciding on substantial evidence and a fair preponderance of evidence, as you know. My question was, would you tell us, during the course of your discussion, why the same preponderance rule should not apply in the appellate court rather than the substantial evidence rule? Now, are you going to tell us that later?

Mr. KELLEY. Mr. Wooden will deal with that at length. There was a time back when the Interstate Commerce Commission was created, a good many years ago, and then later they wanted the decisions of the Interstate Commerce Commission passed on by a court that would review de novo, and try de novo the facts. That is the old Commerce Court. It is all history, but it was pretty generally accepted that the Interstate Commerce Commission was protecting the public interest and the Commerce Court was not.

At any rate, there was a lot said about it, and Congress abolished the Commerce Court. It did not want two courts trying de novo such matters of great importance and public interest. Congress has acted time and again with respect to these matters involved, because they were of so great public interest.

Mr. RABIN. The review by an appellate court does not necessarily have to be a trial de novo if the appellate court uses the fair preponderance rule does it?

Mr. KELLEY. The court reviews our cases very thoroughly and the rule that I have just read is the rule that is applied and courts won't hesitate to set the Commission's findings aside any time that they believe that they are contrary to what reasonable men could and should find. It may be that one of the judges, or maybe in a given case all of them, might say, "Well, we think if we were doing this job, we would have found it just this way, but the Commission found it this way, and we have reviewed the evidence in the record, and we cannot say that reasonable men would not have arrived at that conclusion."

I want to make this plain, and I am going to state it now. The illustration referred to was theoretical, those kinds of matters do not usually arise. In most cases where the courts review our cases, they say that the Commission could not have come to any other conclusion.

Mr. ROGERS. Let me ask this one question right here, and it will not interfere with your statement.

Do you not believe that if there is any condition or case where the preponderance rule ought to predominate, it is where the bureau or the department is prosecutor, jury, and judge? Do you not think it ought to apply there, if it should apply anywhere?

Mr. KELLEY. I think that all administrative agencies ought to be pretty carefully scrutinized by the Congress, and I do not except the Federal Trade Commission. If you have any feeling, and I think you should, go into this matter in view of the statements that the proponents of this bill have made; if you have any feeling that the Commission is not only deciding these cases on the preponderance of the evidence, generally speaking by and large, but of the hundreds of cases, if in 95 percent of them they are not reaching the same conclusion that you would reach or any other court in this land would reach. I think something should be done. But that is not the case. It is far from the case.

Mr. REECE. Then what would be the objection, Mr. Kelley, to writing the preponderance rule into the law?

Mr. KELLEY. The Commission is administering some pretty important statutes, involving monopoly, price discriminations, and the very health, also, of the public. You set up the Federal Trade Commission, and the President, with the confirmation of the Senate, has affirmed five men. I think that they are strong men of integrity, and they are protecting the public interest. They become specialized in this matter, and very specialized. It is hard work, and there are big records. I have had a lot of experience in the circuit courts. We have wonderful circuits courts, and I think that they have done a magnificent job of the review of our cases. Three judges always sit.

I do not think that you should have two trial courts. I might just as well say have three and four, and I would dare say that when you got through you would have the second trial court differing with the first court and agreeing with the Commission, and vice versa. They do not have the time. For one thing, they do not have the time to read all of these records and make complete findings de novo; they have not time to carefully review these records de novo but only where counsel points out that they have not been sustained by the evidence. Later I want to say something about the challenge that was made to the courts by the attorneys representing respondents and what the courts said.

Mr. SADOWSKI. Suppose that you proceed with your statement, Mr. Kelley.

Mr. KELLEY. The foregoing description of the substantial-evidence rule is substantially in accord with that given by Dean Stason, the first witness to appear before this committee in favor of the bill, when he testified in 1941 at the hearings before the subcommittee of the Committee on the Judiciary, United States Senate, Seventy-seventh Congress, first session, on the administrative procedure bills. He then said (pt. 3, pp. 1356, 1357) :

* * * probably the most generally accepted meaning ascribed to the term "substantial evidence" is this: The term "substantial evidence" is construed to confer finality upon an administrative decision on the facts when, upon an examination of the entire record, the evidence, including the inferences therefrom, is found to be such that a reasonable man, acting reasonably, might have reached the decision. On the other hand, if a reasonable man, acting reasonably, could not have reached the decision upon the evidence and the inferences therefrom, then the decision is not supported by substantial evidence, and it should be set aside.

I ascribe fully to that statement by Dean Stason.

Dean Stason further stated that in effect that was the same as the prevailing rule relating to directed verdicts in jury trials and in setting aside jury verdicts because contrary to the evidence. He continued :

* * * many courts have taken the position that substantial evidence should be equated to the rules concerning directed verdicts. That seems to be an eminently sensible conclusion. If it were generally accepted, if it could be made mandatory by statute, then the courts would be obliged to survey the entire records in cases arising under the rule and would be required to sustain administrative-fact decisions if the evidence, including the inferences therefrom, is found to be such that a reasonable man acting reasonably might have reached the decision. On the other hand, if a reasonable man, acting reasonably, could not have reached the decision, then the result would be otherwise and the decision would be set aside.

Dean Stason thereupon endorsed the substantial-evidence rule in the following language:

Thus conceived and interpreted, the substantial-evidence rule would be eminently sound as applied to a vast majority of administrative-fact questions. It would permit wide latitude of administrative action, but it would at the same time check gross and palpable errors.

The flexibility of the substantial-evidence rule was shown by the following statement of the Attorney General's Committee on Administrative Procedure:

Both the judicial and the statutory standards as to the scope of judicial review leave with the courts considerable opportunity for choice and self-restraint in applying the standards to specific cases. The standards are not objective. They relate in large measure to matters of opinion and require the exercise of judgment where differences of opinion are common and frequently reasonable. It is no matter of surprise, therefore, that judges of the same court or of separate courts differ as to whether in a given case the administrative action was supported by substantial evidence and was within the permissible scope of administrative judgment, or was arbitrary and capricious, without substantial support and, hence, without the scope of authority. What one judge regards as a question of fact another thinks is a question of law. * * * (p. 90).

Under existing standards, then, the courts may narrow their review to satisfy the demands for administrative discretion, and they may broaden it close to the point of substituting their judgment for that of the administrative agency. In exercising their powers of review, the courts have been influenced, it is commonly thought, by a variety of inarticulate factors: The character of the administrative agency, the nature of the problems with which it deals, the nature of and consequences of the administrative action, the confidence which the agency has won, the degree to which the review would interfere with the agency's functions or burden the courts, the nature of the proceedings before the administrative agency, and similar factors (p. 91, Final Report of the Attorney General's Committee on Administrative Procedure).

The Attorney General's committee, in discussing the proposal for judicial review of the weight of evidence in administrative proceedings, also questioned the value of the proposal, stating:

In the first place, there is the question of how much change, if any, the amendment would produce. The respect that courts have for the judgments of specialized tribunals which have carefully considered the problems and the evidence cannot be legislated away. The line between "substantial evidence" and "weight of evidence" is not easily drawn—particularly when the court is confined to a written record, has a limited amount of time, and has no opportunity further to question witnesses on testimony which seems hazy or leaves some lingering doubts unanswered. "Substantial evidence" may well be equivalent to the "weight of evidence" when a tribunal in which one has confidence and which had greater opportunities for accurate determination has already so decided (p. 91, Final Report of the Attorney General's Committee on Administrative Procedure).

In *I. C. C. v. Union Pacific Railroad* the Supreme Court in 1911 applied the substantial-evidence rule to the findings and orders of that Commission, without any statutory requirement, by stating that it would not consider "whether on like testimony, it would have made a similar ruling." I assume the presumption is that it would; but they said that they would not go into it, that the decision could not be supported by a mere scintilla of proof, "but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order" (222 U. S. 541, 547). And the Court told them plainly what they meant by substantial evidence. They did not mean any evidence or some evidence. Dean Stason

states that this and other decisions affecting the ICC were firmly in mind when Congress passed the Federal Trade Commission Act in 1914, that the approximation of the rule to the status of jury verdicts was clearly recognized, and that it was this standard that was intended to be written into the Federal Trade Commission Act. That was Dean Stason. He was absolutely correct.

The same intent was evident when the act was amended in 1938. Chairman Lea, in debating the conference report on the Wheeler-Lea amendment of the act, defined the substantial-evidence rule as not debarring the courts, quoting Chairman Lea—

from going into the facts to ascertain if there is substantial evidence because there is evidence that is merely colorable, seeming, or merely nominal. It means an honest-to-God review by the court for the purpose of performing its function of protecting the law against the legislative or the executive departments of the Government.

Chairman Lea also stated that—

of course the court has a right to review the whole testimony before it, with a view of determining whether or not there is substantial evidence—

and that—

it is the fundamental or ultimate fact we are dealing with in deciding what is substantial evidence.

The record also shows that Chairman Lea's interpretation was what the conferees wanted—

to go into the record for future consideration by any court if there is a matter of review involved (83 Congressional Record 9096-9101 (1938)).

For some reason or other, however, the substantial-evidence rule, as Chairman Lea, the courts, and Dean Stason have described and defined it, and as I have set it out, does not correspond to the concept of it that is expressed in statements presented to this committee by the proponents of this amendment to the bill. A number of such statements not only disregard the words of the Supreme Court that the rule does not "go so far as to justify orders without a basis in evidence having rational probative force" but describe the rule as permitting justification of orders of the Federal Trade Commission that have any substantial evidence to support them. They omit the essential requirement that it be substantial enough to rationally support the challenged findings if made by capable, reasonable men. For example, Mr. Isaac W. Digges, representing the National Association of Advertisers, says that "if there is any substantial evidence the court is without discretion in looking to the weight of the evidence."

He further says that—

an attorney for a private party has no right to assume that in his particular case before the Commission it is going to decide on the preponderance of the evidence when the courts have said it is not necessary.

Two things are worthy of note about those statements. I challenge his assertion that the existence of "any" substantial evidence deprives the court of discretion in considering the reasonableness of the findings. And his assertion that the courts have "said" it is not necessary for the Commission to decide on the preponderance of the evidence is, to say the least, rather reckless. For it is equivalent to saying that the courts have said the Commission need not be intellectually honest.

Mr. Digges goes on to raise the question whether Congress intended by the Federal Trade Commission Act to give the Commission—

the right of final determination on questions of fact wherever there was any evidence to support them.

He then raised what he puts as an alternative question—

or did it intend that the rule of substantial evidence meant that the courts had the right to look at the whole record?

As I have shown, the courts have never permitted the Commission's determination on questions of fact to be final wherever there was "any" evidence to support them, and they have examined the whole record to ascertain whether there was substantial evidence on which the Commission's decision could be reasonably reached.

Likewise, Mr. Hugo Mock, representing the Toilet Goods Association, stated that the courts, especially in the *Alpacuna* case and in other cases, have decided that the findings of the Commission "cannot be disturbed if supported by any evidence." In my judgment, that is a misstatement of what the courts have held in any case and also a misstatement of the substantial-evidence rule. The decision in the *Alpacuna* case, and in other cases where the court referred to the conflicting evidence which had to be resolved by the Commission, was that the evidence to support the Commission's findings of fact was so substantial that reasonable minds could have so found notwithstanding the conflicting evidence.

Mr. REECE. Do you plan, Judge, to give your interpretation of the ruling of the court in the *Alpacuna* case? And I think it would be helpful to the committee—since you have referred to Mr. Digges' testimony and Mr. Mock's testimony and that of other witnesses, with reference to the preponderance rule, in which they cited various cases, the number I do not now recall, which was given in support of that view—if you would analyze it. Is that your purpose?

Mr. KELLEY. Mr. Wooden is going to handle that phase of it, and he follows me.

Mr. REECE. There is one other thing that disturbs me about the memorandum which the Commission wrote the committee, to which I referred awhile ago, and that is the statement that if the preponderance rule should be required by legal enactment, that it would increase the volume of the record of the Commission to such an extent as to become cumbersome, costly, and cause delay.

Now, on the basis of the explanation that is now being made, which indicates the preponderance rule is followed, I am unable to see why it should not be required or why its requirement would cause delay or prolong the record.

Mr. KELLEY. Is there any other rule that anybody can state to apprise evidence which might be followed? I cannot think of any other. I cannot conceive of any other.

Mr. REECE. I am not challenging your statement, Judge, but I am referring to, particularly, the letter which the Commission filed on this bill, in which it was stated that the adoption of the preponderance rule would inevitably and materially increase the length of the record in Commission proceedings, unduly prolong the trial of cases, and increase the expense of litigation. The two statements confuse me.

Mr. KELLEY. Well, it just seems to me that if Congress should empower the appellate courts to take our records and try them *de novo*—and by that I mean read the record, sift the evidence, and weigh it—that is going to create a tremendous burden on the court, is going to prolong litigation. I am going to come to that more at length, in order, as I take up specific cases where they challenge the Commission before the courts, on those points.

Now, I would like to say just a sentence about the Alpacuna case. The Alpacuna case, as I understand it—and I think that this committee ought to request the Commission to send up the entire record in the case from cover to cover. It has been talked about. In the Alpacuna case the Commission found that a certain term was misleading and deceptive to the public. I do not think that there was any challenge on this point before the courts in reviewing the Alpacuna case. It went to the circuit court of appeals, and the circuit court of appeals reviewed the case and affirmed the order. The other side asked for a rehearing in the circuit court of appeals, and it was granted, and they affirmed the order, and it is now in the Supreme Court of the United States; and I will just make the prediction that, irrespective of how the Supreme Court decides it, I do not think it has anything at all to do with this preponderance of the evidence rule. There is no question raised by the other side, and there was not in the courts, but what the term was deceptive. The only point in the case was as to whether the deception could be cured entirely, short of requiring the firm to give up the name or whether they could qualify the name. Now, that involves a nice question and it is largely one of law, but it is just beclouding the issue in drawing something that is irrelevant to the issue here to bring in that question.

I think the committee might very well ask that that record, the entire record, be sent up here and read. They mentioned other cases here. That happened to be one that they mentioned, and I would be glad to have you read the record in that case. Maybe the Commission was wrong, and maybe the Supreme Court will say so, when it did not qualify the name as best it could, to prevent deception of the public and still leave them to retain the name, and maybe the public interest required the Commission to do what it did. But we have courts in this land on questions of law, and I think we ought to be pretty well satisfied with the two opinions by the circuit court of appeals and one by the Supreme Court of the United States.

The question of preponderance of the evidence does not enter into it, and there is no question of arbitrary action or any constitutional question. It is just a question as to whether, in the exercise of honest good judgment in the protection of the public, the Commission could have issued a less harsh order. Well, I can say to this committee there are other cases where the court said the order was not harsh enough.

Likewise, Mr. James F. Hoge, counsel to the Proprietary Association of America, stated that on review all that the Court can do is—to see whether there is, in the words of the act, any evidence to support it, and in the words of the interpretations by the courts, any substantial evidence to support.

So Mr. Hoge also treats the substantial-evidence rule as requiring merely some evidence. He also omits the requirement that it be such

that the appellate court can see it would have warranted capable, reasonable men in reasonably reaching the same conclusion. On such a misconception of the substantial-evidence rule, Mr. Hoge bases his conclusion that "as the statute stands today there is really no practical review."

That amounts to saying that for 30 years the courts have merely been going through the motions of a review on the facts. It ignores the most important ingredient of the substantial-evidence rule which they have applied, namely, that it must be substantial enough to reasonably support the findings of capable and reasonable men. Mr. Hoge further says that—

there is now no assurance that issues of facts are determined by the weight of the evidence.

I would like to read that again :

there is now no assurance that issues of facts are determined by the weight of the evidence.

Of course, absolute assurance of such a determination is beyond human attainment. The choice is, therefore, not one between such assurance and lack of it but between two courses, each involving something less than human perfection.

The brief filed with the committee by G. V. Thompson, vice president and secretary of the Cream of Wheat Co., also misconceives the substantial-evidence rule as applied by the courts. He says the present court review is "an admitted mockery" and that the Commission may present "only a sketchy sort of case," and that this will override "a powerful and sound defense supported by all kinds of reputable evidence."

This hearing on this bill is no place for charges of that kind.

Mr. O'HARA. Do you not believe it is the responsibility of Congress to listen to the petitions of its citizens about any bill of any kind?

Mr. KELLEY. I certainly do, and I think it is a great duty on Congress, and perhaps ought to be more often exercised; and I think if charges are true here, the Commission ought to be investigated; and if, after hearing on that matter, they are found to be true, they should be removed from office.

Mr. REECE. Judge, I never got the impression from these witnesses, and that goes for all of them, that they were intending to in any way impugn the integrity of the Commission.

Mr. KELLEY. I have quoted their language, and I have not finished, and I want to come to the next one, and then I will bring that to bear. In the light of your question, there is no halfway here. They went all of the way out.

Mr. REECE. I recall their statements, Judge.

Mr. KELLEY. They said in plain language that the Commission was not deciding by the preponderance or the weight of evidence and that they were deprived of a remedy and the courts' hands were tied, and that it was a "mockery" and that it was "moral bankruptcy."

Now, the Commission ought to have a fair chance to meet those charges. They are very serious. As I said, I do not think that they are appropriate here before a hearing under this bill. They would be

appropriate in impeachment proceedings, but they were made here, under oath, to the members of the committee, and I am not misquoting them.

Mr. REECE. Your quotations are correct, without doubt, Judge, but I cannot help but feel that you are misconstruing not only the motive but the purpose of the argument which these witnesses made. They were only saying the preponderance rule should be required and not left to option of the administrative agency.

Mr. KELLEY. I do not think so at all, and I feel that there is a duty on me to continue with my statement, unless the proponents of that amendment that came here and made that statement come here and apologize to this committee and order stricken from the record what they have said. They would not make those statements before a court. They could not get away with those statements before a court. They could make them to the court in a case that they were arguing, and the court would look in that case and decide whether their statements were right or not, but they could not go outside into other cases, without naming them and when not before the court.

Mr. RABIN. Mr. Kelley, I made the statement at the last hearing, I believe, that there was no evidence presented to the committee that the Commission decided on any rule other than that of the fair preponderance of evidence; I want to say there was no evidence like that.

Mr. KELLEY. I have your statement here, and I am going to quote it, and I am going to show the pages of the record wherein you said that.

Mr. RABIN. I only say that because I would not be too much concerned about that. If those statements were conclusions, they were not proven.

Mr. SADOWSKI. You may proceed, unless Mr. Reece has another question.

Mr. REECE. I started to make an observation, and I wanted to complete that, which was that it seemed to me, and I rather felt that it was the general impression that the hearing, at which the proponents of the bill appeared, were objective. It may be that I fail to conceive or properly interpret it. It is unfortunate that any other construction should be put on it unless clearly indicated, which I think is not the case.

Mr. KELLEY. I am going to quote a few more statements; and I think after I get through quoting them—I did not quote anywhere near all of them—that I think that you will see that I am right.

Mr. REECE. If I may interrupt, somewhere during the course of your presentation, do you plan to cover the question of jurisdiction, conflicting jurisdiction, with the Food and Drug Administration?

Mr. KELLEY. Mr. Cassiday is going to handle that.

Mr. REECE. I am sure that Mr. Cassiday will cover the subject very comprehensively; but if I may make this observation—that in view of the relationship of yourself and your assistant chief counsel, Mr. Whitley, with the committee at the time these two bills were being drafted, that is the Food and Drug and Cosmetic Act, I was hopeful that you or Mr. Whitley, one—

Mr. KELLEY. Mr. Cassiday and Judge Davis, I think.

**STATEMENT OF EWIN L. DAVIS, COMMISSIONER, OF THE FEDERAL
TRADE COMMISSION**

Mr. DAVIS. I just want to make this explanation: I believe the representatives of the Federal Trade Commission are prepared to answer all of the arguments in favor of this bill, and they intend to do it in order and systematically; but no one is prepared to do or expected to do it all. Now, if the committee will be patient enough to give us an opportunity to present our statements and not ask about things that they are not discussing, because they will be answered, and finally I myself, at the direction of the Commission, and as a Commissioner, am going upon the stand, and I will undertake to answer anything that the others have not; and I will welcome any questions from any of the committee, and I will be glad to receive any of the questions and undertake to answer them, including the one that Mr. Reece has just propounded.

Mr. SADOWSKI. You have the assurance of the committee that everyone on your side will have a fair opportunity to be heard and to be heard in order.

Mr. DAVIS. I know; but the point is, if you may permit me to say, to question the witness, who is testifying on one phase of the subject, about matters that do not relate to that.

Mr. SADOWSKI. Of course, in our proceedings, you have attended so many of them, Judge Davis, you know how they run; we are not in a regular court, and we do not have regular procedures and rules of procedure, and our method of questioning is probably sometimes rather irregular, but we will try to give you every opportunity to go along and present your case.

Mr. DAVIS. I understand that. I am familiar with the congressional committee practice.

Mr. REECE. If any of my questions, Judge, were extraneous, I apologize, I raised the question because I rather anticipated possibly the presentation of testimony with reference to the conflict in jurisdiction by Judge Kelley since he is the chief counsel and also assisted in formulating the legislation.

Mr. DAVIS. That will be fully testified to. We will cover that subject thoroughly.

Mr. REECE. I raised that question, Judge, so as to determine when questions relative to that subject should be presented and to what witness. If Judge Kelley is not going to cover that subject, I would not want to ask him the question, I was merely asking the Judge if he was going to cover that during the course of his testimony.

He responded that Mr. Cassiday would cover that and then later yourself, so that answers my question, and relieves me of any anxiety that I might have had as to where I should ask questions on that subject. It was not done in any other sense and I really see no reason why raising the question while Judge Kelley is on the stand should course such a flurry.

Mr. DAVIS. We are undertaking generally to proceed in the order of the provisions of the bill, and the first two witnesses are discussing the first section of the bill.

FURTHER STATEMENT OF WILLIAM T. KELLEY, CHIEF COUNSEL, FEDERAL TRADE COMMISSION

Mr. KELLEY. I was talking about the statements that Mr. Thompson made to this committee. He stated that court review is "an admitted mockery" and that the Commission may present "only a sketchy sort of case" and that this will override "a powerful and sound defense supported by all kinds of reputable evidence." Thus Mr. Thompson also conceives of the substantial evidence rule as one which inhibits the courts from considering whether reasonable men could have reasonably decided the case as the Commission decided it on the evidence. Mr. Thompson even goes so far as to say that the Commission "has the power, if it so chooses, to decide the case against the overwhelming weight of evidence, provided it has been able to produce a connecting thread of evidence that will support its conclusion."

Mr. Thompson goes on to suggest the possibility that the Commission "could put a none too reputable witness on the stand who would testify to enough facts on which to build what might be called a substantial case, and it could then sit back, after hearing many reputable witnesses testify to the contrary, and proceed nevertheless to make its decision based upon the testimony of its own single witness."

Mr. REECE. Mr. Chairman, I do not want my questions to be misconstrued, Judge, but this, after all, is dealing with a rather vital phase of the bill.

And you have referred to Mr. Hoag's testimony and he had prepared an extension in which he cited further cases that did appear in that record and now in the *Harriet Hubbard Air, Inc., v. Federal Trade Commission*, the court made this statement:

The rule is now well recognized that the finding of fact by the Commission, having any evidence to support it is conclusive and binding upon the courts and we may not review the weight of the testimony.

Now, then, and before you answer me, just let me refer to one other case, in the interest of conserving time.

In the National Harness Manufacturers Association case:

The statute further provides that the finding of facts by the Commission shall be conclusive, if supported by any evidence.

Is there any significance there in the use of the word, "any," by the court in its statement?

Mr. KELLEY. That is not the rule. The courts know that that is not the rule.

Mr. REECE. I was quoting.

Mr. KELLEY. I have read the decisions here by the Supreme Court. The courts use that language but they do not apply that when they make a critical examination of the Commission's findings.

Mr. O'HARA. You mentioned the Carley case—what happened to that case on review?

Mr. KELLEY. The court set the findings of the Commission aside on that rule.

Mr. O'HARA. Wait a minute. They set it aside on the grounds that there was not any evidence to sustain the findings?

Mr. KELLEY. No. On the ground that it did not meet the test of that rule, that I read. That was a pretty strong test.

There was evidence, but it did not meet that substantial-evidence test that the court applied.

Mr. O'HARA. Wait a minute. I will ask you to wait on me just a minute. I will ask you: In the Carley case, was it not the decision of the court that there was no evidence, no evidence to sustain the findings of the Commission?

Mr. KELLEY. I do not think so; there was no substantial evidence.

Of course, there was evidence.

Mr. O'HARA. Let me read what purports to be a copy of the decision, in which the court said this, and I am quoting:

There is no evidence in this record to support a finding that is necessary, in order to follow the suggested plan, that the users adhere to a restricted diet.

Mr. KELLEY. I think that is so. When the court used that language, it meant that there was no evidence that measured up to their standard.

Mr. O'HARA. That may be.

Mr. KELLEY. They set out the rule.

Mr. REECE. But you were in a way getting back to what you said about these witnesses who made these statements and cited cases. I cited two here, which are along the same line, or convey somewhat comparable impressions, as that conveyed by some of the witnesses, to which you are taking exception, and these are decisions of the court, and I know you would not impugn the purpose of the court in making these statements in its finding, and I question whether we ought to do so with the witness whose statements are relying upon the court's decision, so far as the statements made, are concerned. In any event I think a witness of the high standing of those appearing here should be able to express his views on the bill without having his motives challenged or be intimidated by the Commission before which may later find it necessary to appear.

Mr. KELLEY. I disagree very substantially with your conclusion about the statements of these witnesses here being the same as what the court said.

I disagree very substantially with the statements. I do not put them in the same category at all.

Two observations might be made upon that statement. First, that it is a distortion of the substantial-evidence rule as the courts have applied it because it falsely imputes to the courts the necessity of upholding the Commission even though the courts believe that reasonable men could not have reached the Commission's conclusion on the evidence in the whole record. Second, the implication is clear that the Commission is disposed to reach its conclusions regardless of the weight of the evidence. That is conceivable in any forum for factual determinations, but it cannot be raised with regard to some particular fact-finding body without challenging its integrity.

This latter observation is borne out by the fact that Mr. Thompson immediately proceeds to cite "for instance" the Commission's cases involving basing-point systems. Unfortunately for Mr. Thompson's argument, the Supreme Court, in the two basing-point cases, which reached it, declared in one case that the Commission's conclusions were "amply supported by its findings and the evidence" and in the other that they were "amply supported by the record."

Again, the brief of the Motor and Equipment Manufacturers' Association before the committee misconceives and misstates the substan-

tial-evidence rule. It also assumes a case where a single witness gives substantial testimony and numerous other witnesses contradict him and are supported by objective evidence. It then asserts that the Commission's findings based upon the single witness' testimony are "binding" upon the circuit court of appeals because it constitutes substantial evidence. That is a distortion of the substantial-evidence rule because the findings based upon such testimony are binding on the courts only if they conclude that reasonable men might have reasonably relied upon it notwithstanding the conflicting testimony. It need not be accepted by the courts as sufficient unless it meets that standard, and in fact it is accepted only when it does meet that standard.

This association brief also says (p. 5) that if—

the outcome of the Federal Trade Commission proceedings is to continue to be controlled by factors other than the fair preponderance of evidence, it would represent a deplorable condition of moral bankruptcy and judicial impotency that would turn away the victim without a remedy.

The inescapable meaning of that language is that the Commission has been controlled by factors other than the fair preponderance of evidence and that the courts have been helpless to extend relief to the victims of this deplorable condition of moral bankruptcy. Aside from its aspersions on the moral integrity of the Commission it distorts the substantial-evidence rule by implying that it requires the Commission's findings to be upheld if sustained by any evidence, although the rule requires them to be sustained by such evidence as reasonable men might find sufficient.

The brief of the Motor and Equipment Manufacturers Association also says that the Commission's opposition to this provision of the bill—

necessarily implies a desire upon its part to retain its present power to decide the rights of respondents in a manner that runs counter to the weight of the evidence.

This appears on page 6.

The Commission denies that it has any such power under the substantial-evidence rule. Accordingly it cannot desire to retain what it does not have. It has power to decide the facts only to the extent and in the manner that the courts say reasonable men might have decided them. The clear implication of the quoted statement and of its context is that the Commission desires to retain a power which if it existed and were exercised would impugn the integrity and good faith of the Commission.

Indeed, the brief argues that a desire to retain the substantial-evidence rule amounts to a desire to disregard the preponderance of the evidence, appearing on page 7. That is to charge the Commission with a desire to decide arbitrarily and contrary to the weight of the evidence. Impeachment and not amendment is the only appropriate remedy for such a condition. The association closes its brief on page 16 with the argument that the paucity of appeals results from the inability of the courts to "accord justice" because "the appellant cannot succeed, even though the preponderance of evidence is on his side."

This is another form of charging the Commission with having decided the unappealed cases against the preponderance of the evidence. It overlooks the fact that under the substantial-evidence rule the

courts can set aside findings if they are not based on evidence that would warrant reasonable men reaching the same conclusion.

The memorandum filed by Chadbourne, Wallace, Parks & White-side also misstates the substantial evidence rule as follows:

No matter how clear and convincing the evidence to the contrary may be, the Commission can support its position and make findings of fact in accordance with its complaint which are entirely unassailable, provided it can point to any substantial evidence in the record in support of the facts as it claims them to be (p. 3).

Again it must be stated that the courts require that the evidence be substantial enough to warrant capable and reasonable men reasonably reaching the same conclusion as the Commission. Thus that concept of the rule automatically contradicts and cancels the hypothesis embodied in the above-quoted words "no matter how clear and convincing the evidence to the contrary may be."

The fatal defect common to all these statements which I have analyzed is that their attack on the substantial-evidence rule is based upon a misconception or a misstatement of the rule itself. The rule is a definite appellate safeguard against the possibility of arbitrary or capricious action by the Commission.

Dean Stason stated to the committee that—

"under current judicial opinions, the court review does not apparently extend to what the courts are calling inference from the facts (typewritten transcript p. 5).

He urged that the inference to be drawn from the evidentiary facts should be subject to the same standard of judicial review that is applied to the evidentiary facts themselves (ibid. p. 10).

I believe Dean Stason is mistaken in his belief that the substantial-evidence rule does not apply to inferences. At any rate in the leading case on the point, that of *F. T. C. v. Pacific States Paper Trade Association*, the Supreme Court did not merely announce the principle. It actually reviewed the Commission's inferences, applied the same standard of reasonableness as under the substantial-evidence rule, and sustained the Commission's inferences by that standard.

The Court did not merely say that the weight of the evidence and the inferences therefrom were for the Commission. It said that the inferences "reasonably" to be drawn from them were for the Commission and that the inference in question did not "go beyond what is justified by the findings" (273 U. S. 52, 63).

And in recent cases the circuit courts have not refrained from testing the Commission's ultimate inference of a price fixing combination by the same standard of reasonableness that the Supreme Court applied in the *Pacific States Paper Trade Association* case.

I do not believe that the quotation that Dean Stason made from Justice Douglas in the *Link-Belt* case or from Judge Allen in the *United States Truck* case can be taken as supporting the proposition that the courts are foreclosed from reviewing the reasonableness of inferences from the facts any more than they are foreclosed from reviewing the reasonableness of the factual findings themselves.

In 1941 Dean Stason himself thought the language of the courts regarding inferences in recent cases might be "fortuitous rather than indicative of a trend in establishing a new definition of substantial evidence." See his article "Substantial Evidence in Administrative Law," 89 *University of Pennsylvania Law Review* 1026, June 1941.

He himself cited *N. L. R. B. v. Columbia Enameling Co.* (306 U. S. 292) as indicating otherwise. There the Supreme Court in 1939 had stated "But as has often been pointed out," the conclusive character of the Board's findings depends upon the existence of evidence "which is substantial, that is, affording a substantial basis of fact from which the fact in issue can be reasonably inferred" (p. 299). That corresponds to Chairman Lea's statement that it is the ultimate fact we are dealing with when deciding what is substantial evidence.

One of the arguments made in various forms by various witnesses before the committee is that the preponderance of evidence rule is needed on review of the Commission's findings because it is necessary or desirable to hold the Commission to the same rule when reaching its decision to issue the order to cease and desist. No matter how cleverly that argument may be formulated, it implies that the Commission uses some rule other than that of the preponderating evidence.

Now, as Congressman Rabin observed on several occasions in this record (pp. 114, 115, 195) there is no rule that the Commission or any other administrative agency could use except that of the preponderating evidence. The moment anyone begins to imply or suggest that the Commission does not use that rule, that moment he begins to imply or suggest that the Commission decides contrary to the weight of the evidence. It is idle for those who advance such arguments to protest that they do not mean to impugn the Commission's integrity.

If they could only point to some rule other than that of preponderating evidence which the Commission could conceivably use such protests might have a plausible basis. But it is inherently impossible for any public official from a justice of the peace to the Supreme Court of the United States to decide any issue of fact according to any standard other than that of the preponderating evidence and remain intellectually honest.

It is equally impossible for any private individual in his private affairs to be intellectually honest unless he resolves disputed questions of fact in his own mind upon what is to him the weight of the evidence.

The fact that the Commission applies the preponderance of evidence rule is illustrated by its decision of May 3, 1944 in the Listerine case, D. 4232. In the concurring opinion of Commissioner Ferguson, he said,

It is the duty of the Commission to decide issues of fact, whether or not the medical or scientific questions are involved, by the greater weight of the evidence—the burden of proof being on the Commission.

Commissioner March in his concurring opinion concluded that "the allegations in the complaint are not sustained by the greater weight of the evidence." Commissioner Freer also made a detailed analysis of the evidence in his concurring opinion.

Commissioner Ayres, however, dissented from the majority as to what the weight of the evidence was in the case after analyzing it in detail. This case emphasizes the obvious fact that it is impossible for the several Commissioners to apply any rule other than that of the preponderating evidence without automatically questioning the good faith with which they acted in reaching their several conclusions.

So I submit that the substantial evidence rule as applied in appellate courts to the factual findings of this Commission has been widely misrepresented before this committee as requiring the courts to sustain

the Commission if there is any evidence, while the rule really requires the evidence to be such as would convince a reasonable mind.

I also submit that to substitute the preponderance rule would go far beyond the legitimate appellate function of seeing that the original trial body reaches its factual conclusions on the basis of rational, probative evidence and would simply make the appellate court a second trial court.

Now, how has the substantial evidence rule actually worked in practice? Has the Commission been taking advantage of the rule itself and which reasonable men could not make if they considered the preponderance of the evidence? Have the appellate courts been reluctantly sustaining the Commission because the statute ties their hands, although they believed that the Commission was not finding the facts as reasonable men might have found them according to the weight of the evidence? To so imply is to challenge the integrity of the courts, for there is nothing to prevent them setting aside the findings if they are not such as reasonable men might make on the evidential record. Every presumption is against that being the situation but I propose to demonstrate by proof that it is not the situation.

First, let us consider the cases where no appeal has been taken from the Commission's orders. As before shown the Motor and Equipment Manufacturers Association argues that the small number of appeals from the Commission's orders results from the inability of the courts to "accord justice." Let us examine that assertion in the light of the facts.

I have a table listing all of the findings as to the facts and orders to cease and desist issued by the Commission in food, drug, therapeutic device and cosmetic cases, subsequent to the enactment of the Wheeler-Lea Act in 1938. The Commission made findings as to the facts and issued orders to cease and desist in 462 such cases.

Mr. REECE. I do not want to interrupt you too often, but here is a statement of the court. To what extent does the statement of the court differ with that?

The rule is well recognized that the finding of fact by the Commission had any evidence to support it is conclusive on the court and we may not review it.

Mr. RABIN. May I interrupt for a minute? I think there are two standards, one that the Commission has to use, and that is a fair preponderance rule. The other, under which the court reviews, and that is the substantial evidence rule.

Mr. KELLEY. That is right.

Mr. RABIN. I believe when the court says that, it means that the court cannot substitute the preponderance rule for the substantial rule in connection with its review. I do not think that any court in the country has ever said that the Commission may, in the initial hearing, use anything but the fair preponderance rule although in review, the court may not use it.

The appellate court cannot go that far.

Mr. REECE. They cannot weigh the evidence?

Mr. KELLEY. That is the point.

Mr. REECE. Now then, if the litigant should feel that the Commission had not used the preponderance rule?

Mr. RABIN. That is right. That could be.

MR. REECE. Does he have any remedy in the courts?

MR. RABIN. That is the reason we are discussing this bill—whether we should give him a remedy. I think the only thing he can do—he is stopped in the higher courts where the other side shows that they had a substantial amount of evidence to support it, he is stopped there, and that is one of the defects that we are discussing now—as to whether there should be a proper remedy for it.

That is the question I tried to put to the witness earlier this morning.

MR. REECE. You have done a great deal to help clarify the situation.

MR. RABIN. I think you are right in that respect. The witness is stopped. I do not mean the witness is stopped, I mean the party is stopped at that point.

MR. KELLEY. I would like to proceed.

MR. SADOWSKI. We have five witnesses. At the rate we are going, we will be here a month. Let the witness proceed. You had a question, Mr. O'Hara?

MR. O'HARA. I say the substantial evidence rule actually, if it gets in the appellate court, practically means the scintilla of evidence, that is, if there is any evidence.

MR. KELLEY. No; far from it.

MR. RABIN. And on that point, when you quoted that court, that said there was no evidence, of course, if there is no evidence, the court should reverse. But it does not go as far as to say if there were merely some evidence, that it would affirm.

MR. KELLEY. The critics of the substantial evidence rule seem to be drawn largely from those interested in such cases. In 58 other cases the Commission had either dismissed the complaint or closed the proceeding. How can so many dismissals be reconciled with the theory that the Commission disregards the weight of the evidence or acts with a closed mind after complaint is issued? This is significant.

In 180 of these 462 cases the respondents filed answers admitting all of the material facts alleged in the Commission's complaints. In 97 cases of the 462 the respondents entered into a stipulation as to the facts. The cases in which respondents filed answers admitting the facts and the cases in which the respondents stipulated as to the facts total 277, or 60 percent of the total number of cases.

Certainly there can be no question concerning the substantiality of the evidence with respect to these 277 cases. The Commission's findings were based upon respondents' own admissions or upon respondents' stipulations as to the facts. The admissions or stipulations are themselves the equivalent of a finding. They are all listed here and all statistics about the outcome, and so forth.

All the Commission did was to find the facts admitted or stipulated and draw its conclusions from such facts. Respondents in these cases did not appeal, but it was their privilege to appeal and have the Commission's order set aside if the conclusion of the Commission was not warranted in law. So at one stroke we eliminate 60 percent of such cases from the possibility of any contention that the Commission did not act on substantial evidence or on the preponderant evidence.

The Commission made findings as to the facts and entered orders to cease and desist in 185 of these cases where evidence was taken. Now, the question arises whether the Commission's findings in these cases

were based upon substantial evidence or whether the Commission made findings without evidence or whether on evidence that was insufficient and unsubstantial.

These 185 cases in which findings were made in adversary proceedings after trial constituted 40 percent of the total number of cases. One hundred and forty-two, or 80 percent, of these respondents did not appeal. I presume they were satisfied or at least felt that the findings were right factually and the orders proper as a matter of law.

Mr. REECE. If I may interject, and I am not asking a question. I heard that the litigants sometime may feel that due to the inadequacy of the power of the courts to review and cover the subjects that we exchanged views on just awhile ago, that they are without any remedy?

Mr. KELLEY. I do not think so, Congressman, and do you think that it is sensible that the Commission is going to, after an investigation, take and file a complaint making charges of a violation, and that the people will come in and sign a solemn paper admitting those facts if they did not think they were true?

The truth is that the Commission is very diligent in getting the facts, and its integrity cannot be impugned in protecting the public interest in carrying out the mandate of the Congress and the intent of the Congress as embodied in those acts.

Mr. RABIN. You think you will have the same number of stipulations regardless?

Mr. KELLEY. Of course you would. When they sign those admissions and make those stipulations, those people represented by counsel know they are true and they know we can prove them.

Mr. O'HARA. Do they all sign: do they all agree?

Mr. KELLEY. There were 277, or 60 percent, either signed admissions or stipulations, the equivalent of them.

Mr. REECE. That being the case, then, would any harm have resulted from an amendment to the statute which would have given them the right to appeal.

Mr. KELLEY. I do not believe that it is good business and I do not think it is in the public interest and good policy for the Congress of the United States to take an amendment or repeal these laws as to give the appellate courts the power to weigh de novo the evidence. There are 10 circuits in the country.

Those judges are busy. I think that if the Congress are not satisfied with the five commissioners that they have, they ought to get five new ones. And take and select those from the circuit courts of appeals, or the best lawyers in the United States. I think that is the answer.

The answer is not with that commission or with the law, or the procedure.

Mr. REECE. Speaking for Mississippi and not the Congress—

Mr. KELLEY. That is what I think, and I think it would be decidedly bad.

Mr. REECE. I am quite well satisfied with the personnel of the Commission, and I am pleased to say I am satisfied with the chief counsel.

Mr. SADOWSKI. Let us proceed.

Mr. KELLEY. It is not easy for the Federal Trade Commission to do a lot of things. It is pretty hard. They dismiss a lot of cases. As I told you, they dismissed, under the Wheeler-Lea amendment, since

1938, 58. Some of them I would not have dismissed. That is neither here nor there.

The circuit courts of appeals are pretty diligent and do not think that the attorneys for the respondents are not when they go to the circuit courts of appeals. Do not think the Commission is getting away with anything. Not with a thing. And when we go before the circuit court of appeals and argue these cases, repeatedly the judge comes to know us. When we make statements to those judges about the evidence on that record, we better not fool those judges.

Once we did we would be done.

Mr. O'HARA. I would like to say that I started in on this hearing and I have gone all through it up until today and I never at any time assumed that anybody was charging that there was anything wrong with the integrity of the Commission.

You are protesting so much this morning that I confess you have me concerned.

Mr. KELLEY. They say that the Commission is making findings, based upon, some of it, not any evidence and not on the weight of the evidence and the substantial character of the evidence, and they say that if it continues that it is going to be moral bankruptcy, in just those words.

Mr. RABIN. I do not think they say the Commission is consciously doing that. I think they merely disagree with the Commission's conclusions when they make that statement.

Mr. KELLEY. I am dealing with the plain English language, and in plain language, in clear words, I do not think there is any room for disagreement about that. There is only one answer.

Mr. SADOWSKI. Mr. Rogers wants to ask you a question.

Mr. ROGERS. Judge, I want to ask you this question: Of course, this is in the interest of the public, that is what this is all being administered for. How will this restriction impede your efficiency or the efficiency of the Commission if this rule is written in here?

Mr. KELLEY. I do not know how much, if any.

Mr. ROGERS. In other words, can you not do just as well?

Mr. KELLEY. I think the Commission would administer the law and in the public interest, and I think the courts would do a good job. I do not think that it ought to be. When we framed our Constitution we wrote that into our Constitution, with respect to factual matters, with respect to jury. I do not think you ought to have two or three tribunals that would keep trying the factual issues.

Mr. ROGERS. Would you not just as soon continue services as attorney for the Commission if we write this in here where you know your duty just like it is now, as to do it under the present statute?

Mr. KELLEY. I do not think it would be in the public interest, and honestly, I would have to predict that I do not think it would last 5 years.

Mr. ROGERS. Do you not think that the courts in each event would try to find the facts and render or help the Commission all they could in rendering the facts?

Mr. KELLEY. I think the courts are doing that now, and I think the courts are giving a real, honest-to-goodness review of these records. And they are pretty big records.

We have some tremendous cases, and some of the circuits are getting rather expert with some of the problems that are coming up under the Robinson-Patman Act, and monopoly questions involving basing points, and zone systems, and all of those things, but most of those cases go to the second and seventh circuits. We have a case now in the seventh circuit in which there was filed 29 different preliminary motions. Respondents have 17 firms in that case. There are 50,000 pages of testimony. How many pages of exhibits, Walter?

Mr. WOODEN. They claim up to 100,000. That is an estimate including a lot of publications of books, freight-rate books, and things like that. They had them all in.

Mr. KELLEY. I am not talking here largely about a little case of 400 or 500 pages, or record 300 or 400 pages involving some false statements concerning a drug. It is bigger and deeper than that. The drug people seem to be more interested here.

Mr. REECE. If I may take just a moment, Mr. Chairman, and this is not a question, but simply a quotation from a statement by Dean Pond, in which he says:

One of the most serious features of the administrative adjudications that administrative agencies act as judges in cases in which they are also prosecutors, and so, in effect, act as judges in their own cases. Many of these agencies entertain complaints, institute investigations upon them, begin what are in effect prosecutions before themselves, and all through their own subordinates to act as advocates for the prosecution, and often make the adjudication in conference with the same subordinates.

That just relates to the question of procedure here and is by Judge Pond, and does not apply especially to the Federal Trade Commission, but to all administrative agencies.

Mr. KELLEY. I have the greatest respect for the ability and eminence of Dean Pond. I do not agree with him and do not agree with him at all with respect to his views with respect to administrative tribunals. He does not believe in them.

I went through for a great many hearings before the subcommittee of the Judiciary of the Senate on those administrative bills. There were a great many eminent witnesses called. Ultimately there was formulated S. 7. I have no complaint about S. 7 with respect to the provisions concerning court review.

Mr. REECE. Well now, here is a statement along the same line by Dean Landis, who was a member of the Federal Trade Commission:

When I went to the Federal Trade Commission, I found that the findings of that Commission were, as a matter of practice, drafted by the Commission's attorneys in the case and the prosecuting attorney. It seemed to me absolutely wrong that that should be so. True, the Commission exercised an independent judgment before it said, "Issue an order or do not issue an order," but the findings supporting that order were drafted by the attorneys who presented the case. Naturally he tied the respondent so that the respondent could not move with the findings he drafted.

These have bearing, therefore, and I am reading them in the record for whatever they may be worth.

Mr. KELLEY. I would like to say a few words about that.

I came to Washington in December of 1914 from Wisconsin, when the Federal Trade Commission was organized.

Congress spent a long time——

Mr. REECE. If you would permit an interruption——

Mr. KELLEY. I want to answer your question.

Mr. REECE. You refer to the length of your service?

Mr. KELLEY. I would like to finish.

Mr. REECE. You are going to be pleased with what I say. I have been here for a long time, 24 years. And I have heard many remarks about the Federal Trade Commission by litigants and attorneys who have had business before the Commission, and I have never heard you, or your work, or the work of your chief assistant, and himself referred to except in the very highest terms as being capable, devoted and conscientious members of the staff of the Federal Trade Commission.

Mr. KELLEY. Thank you.

Mr. REECE. I think that is almost the universal opinion, Judge, and certainly it reflects my own opinion. And please, from any questions that I may propound, do not draw any other conclusion.

Mr. KELLEY. I thank you.

I came here with the Commission and at that time the Commission was floundering about pretty much. The administrative law was new. The Commission employed Stephen Gregory, of Chicago, to draw up its first rules of practice. It did the best it could. It has been a matter of evolution.

I know that at one time, the attorneys that were trying the case participated and had something to do with the finding. That all stopped, and not only did that stop, but I think that the Commission has been sort of a pattern for all agencies. It has been a question of evolution.

You go back and read our first rules of practice today. From year to year they have changed gradually.

Administrative law was new when the Commission was organized. The only guide we had was the wonderful yardstick that Judge Cooley had laid down when he came with the Interstate Commerce Commission. That is not so today.

The Prosecution Division of the Commission has nothing to do with the decision or findings. It is wrong. They did do it at one time and I acknowledge it. They quit it. There are a lot of things that have been stopped. There is a matter of evolution about these things.

Mr. SADOWSKI. You may proceed, and I hope with a little less interference.

Mr. KELLEY. Only 42 cases were appealed to the circuit courts of appeals for review of the Commission's action. The orders of the Commission in 33 of the cases were affirmed by the circuit courts of appeals, seven orders were modified, and two orders reversed.

Those 42 were naturally getting closer to dividing lines as to what was lawful and what was unlawful. It is pretty hard sometimes to always hit the nail right on the head. But anyway, there were 42 appeals.

There was not a single case among the 42 reviewed by the circuit courts of appeals where the court took the view or even intimated that reasonable men could not have reasonably found the facts on the whole record as the Commission found them. Had the courts entertained that opinion the substantial evidence rule would have permitted and required them to set the findings aside. The cases where the courts have not agreed with the Commission on the appropriate form of order or where they questioned its discretion as to the remedy

to be applied fall into a wholly different category. They are wholly irrelevant to the issue of the relative merits for appellate purposes of the substantial evidence rule on the one hand and the preponderance of evidence rule on the other. When such cases are brought in they merely becloud the real issue and involve a matter that this bill as it now stands does not even purport to do anything about.

Now let us consider another class of controversial cases where the courts have reviewed the Commission's findings of fact. In no cases do respondents more vigorously challenge the findings of the Commission as unsupported by substantial evidence than those involving price-fixing conspiracies and price discriminations prejudicial to competition. Sometimes whole industries are involved.

And in no class of cases is there more room for reasonable differences of opinion as to whether the evidence is sufficient to support a conclusion of unlawful action. How have the courts treated the Commission's findings in such cases? Have they merely examined the record enough to satisfy themselves that it contained some evidence to support the Commission's findings?

On the contrary, they have satisfied themselves that it contained sufficient evidence to warrant reasonable men finding the facts on the whole record as the Commission found them.

In many cases they have said that reasonable men could not have found otherwise.

In the Matter of Eugene Dietzgen Company et al., the Commission made findings and issued an order against 10 important respondents, involving a conspiracy to fix and maintain prices. Respondents appealed the case to the circuit court of appeals. Respondents in their brief challenged the Commission's findings as follows:

We assert with confidence that there is not a scintilla of evidence in the record of any agreement on the part of petitioner or any other respondent to submit identical bids at any offering of the Government or any other parties whomsoever.

Now this was a serious charge to the circuit court of appeals. I invite the committee's attention to the decision of the court in this case, decided by three judges of the Circuit Court of Appeals for the Seventh Circuit. Now what did the court find and say after it examined the whole record? The court said:

The evidence not only supports the fact findings of the Commission as to the suppression of competition agreements, but it made any other finding impossible.

The Circuit Court of Appeals for the Second Circuit reviewed and decided the matter of the Commission against the Wholesale Dry Goods Institute et al. The petitioners challenged the findings of the Commission. Here is what they said on page 43 of their brief:

Not only is there a total failure of proof to show that our problem was even taken into consideration by any manufacturer in reaching any decision to change his general sales policy, but also there is no evidence to support any conclusion as to the existence of any agreement or concerted action among the members to make wrongful use of the mill selling policy reports.

Three judges of the circuit court of appeals scrutinized the record. I do not have the statistics whether they were modified by the court, on its own motion or on suggestion of counsel. Perhaps some both ways.

There were 33 affirmed and 7 which were modified and 2 which were reversed. The court said:

Not only was there "substantial evidence" to support the findings, but it is impossible to see how any fair tribunal could have come to another conclusion.

The Commission made findings and issued an order against concerns engaged in the malting industry. The findings of fact made by the Commission and its conclusions drawn therefrom were challenged before the Circuit Court of Appeals for the Seventh Circuit. Respondents contended in their brief:

We have, we believe, clearly demonstrated under point 1 of this brief the lack of any substantial evidence in this record of agreement as to price.

Three judges of the circuit court of appeals reviewed the record in this case. The court said:

We are of the view that the Commission's findings that a price-fixing agreement existed must be accepted. Any other conclusion would do violence to common sense and the realities of the situation.

That same opinion expressed the court's concept of the substantial evidence rule very much as I have defined it. The court stated that "our function is limited solely to an inquiry as to whether the record furnishes substantial support for such findings." Note that the court did not say it was limited to an inquiry as to whether the record contained any or some substantial evidence but could inquire whether the record as a whole "furnishes substantial support" for the findings. The court went on to say that in making its inquiry it was "not permitted to weigh the evidence and it is of no consequence that we might disagree with the Commission's findings if the issues were presented to us as an original proposition."

Very carefully scrutinize that record. There were several counsel representing the respondents, that might challenge the court on these matters.

What did the court do? Manifestly, however, the court would have agreed with the findings had the issues been presented to it as an original proposition. The courts in these decisions set out a great deal of it in their opinions. I invite the committee's attention to these decisions.

The Commission made findings and entered an order against the milk and ice cream can industry. The respondents challenged the Commission's findings before the court. One of them asserted to the court in its brief:

This finding is not supported by evidence and appears to be based entirely on inferences which, it is contended, are not justified by the evidence.

Another respondent asserted in its brief:

There is no evidence, much less substantial evidence, to support the findings of fact upon which the cease-and-desist order is founded.

Still another respondent informed the court that the order was—I ask the committee to read and look at this record, and read the opinion of the court; manifestly the court did not agree that they would disagree with the Commission. The court said that the Commission could not come to any other conclusion—that the court order was "based upon a theoretical or imaginary state of facts resulting from the unfair and injudicial manner of prosecution."

Again, three judges of the circuit court of appeals reviewed this record and wrote a lengthy opinion in which various facts were detailed and analyzed. The court said:

A study of the record is convincing not only that the finding is substantially supported but that it would be difficult to reach any other conclusion. On the face of the situation, it taxes our credulity to believe, as argued, that petitioners employed this system without any agreement or plan among themselves. Any doubt in this respect, however, and other evidence found in the record. We have merely touched upon some of the circumstances relied upon by the Commission in support of its finding that petitioners acted concertedly and by agreement. It is futile to contend that all of the activities could have been carried on so scrupulously and meticulously without an understanding or agreement. Any other conclusion would do violence to common sense and the realities of the situation.

A good deal like the proponents of this bill have told this committee.

The Commission made findings and issued order against Corn Products Refining Co. The Corn Products Refining Co. challenged the findings and conclusions drawn by the Commission. They stated:

The record does not warrant findings essential to a determination that sections 2 (a) and 2 (e) of the Clayton Act have been violated in the respects alleged. If there existed facts which would support such findings, which we deny, the Commission had ample opportunity to present proof of them.

The Supreme Court said:

The several violations of section 2 (a) and 2 (e) of the Clayton Act, found by the Commission, sustained by the court below, and brought here for review, fall within the prohibitions of the act. The Commission's conclusions are amply supported by its findings and the evidence, and the judgment is affirmed.

The Commission made findings and issued an order in the matter of A. E. Stanley Manufacturing Co., a producer and seller of glucose. The circuit court of appeals reviewed the case and by a divided court set aside the Commission's order. The Supreme Court of the United States then reviewed the case, reversed the circuit and affirmed the Commission's order. Respondents challenged the findings and conclusions of the Commission. They stated:

We submit that respondent (the Commission) is again stating conclusions without a basis in fact for its conclusions.

Chief Justice Stone, speaking for the Supreme Court, said:

The Commission's conclusion seems inescapable that respondents' discriminations, such as those between purchasers in Chicago and Decatur, were established not to meet equally low Chicago price of competitors there, but in order to establish elsewhere the artificially high prices whose discriminatory effect permeates respondents' entire pricing system. * * * In the present case the Commission's finding that respondents' price discriminations were not made to meet a "lower" price and consequently were not in good faith is amply supported by the record.

I do not mean to, in the least, criticize counsel for respondents in making these claims which the courts have thus rejected. I do not question their integrity and good faith. I know that they seriously and conscientiously believed that they were right.

I wanted to say this, that you have an example there of counsel going before that court who had jurisdiction and before them had the record and it was perfectly proper for counsel to go before that court, as all of these counsel did in these cases, and tell the court, "you set that order aside because there is no evidence to support it."

That is the duty of the court, and the court has jurisdiction and must look into that to find out whether it is so or not, but it is altogether different when attorneys come before this honorable body and do not name a case and do not put their finger on a case so that I can challenge it, and state that the Commission is making findings that do not reflect the weight or the preponderance of the evidence.

I say that statement is not so. I challenge them to name the cases and we will send them up here to this committee to review. I invite the committee to inspect all or any of these cases.

There are some statements here that have been made that I challenge. I have read a number here. I have only two. I have a couple that the Supreme Court had said they were challenged.

It was their right and duty to bring to the attention of the courts all matters they thought wrong. The point I am making is that after their contentions were brought to the attention of the courts the courts denied them and affirmed the action of the Commission, not merely as based upon some evidence but as based upon evidence such as would have precluded reasonable men from finding otherwise.

I could call a very large number of cases to the attention of this committee. In my judgment, and I have been very close to this work, the real grievance is not that the Commission's findings lack substantial evidence to support them. It is that the Commission brings to its task such a wealth of experience and skill in the factual exposure of plausible but unfair trade practices as to give primary emphasis to protection of the public interest as against private profit.

I will be pleased to lay before the committee any number of these cases that the committee may select if it desires to scrutinize these records minutely in order to determine whether the Commission honestly and judicially weighs the evidence and makes findings and draws conclusions that are grounded upon the greater weight and preponderance of the evidence. In my judgment this amendment is not only unnecessary but it is unwise and not in the public interest.

I know that they had believed that the record did not support the conclusions that the Commission drew in those cases, and they had a perfect right to present them to the court and they did, but the court answered.

I would like to lay before the committee these tables.

Mr. SADOWSKI. Do you want them in the record?

Mr. RABIN. Just one short question. Those 485 cases referred to—what period of time do they cover?

Mr. KELLEY. There were 482 findings and orders, in food, drug, and cosmetics and therapeutic device cases, only that is since the Wheeler-Lea amendment.

Mr. RABIN. I want to know what period of time.

Mr. KELLEY. Since 1938 the enactment of the Wheeler-Lea amendment.

Mr. REECE. Before we conclude, my eyes catch an extract from the Dearborn Supply Co. case in which the court said in its statement:

Inasmuch as we are convinced after careful examination of the record that there is no substantial evidence to support the findings of the Commission upon which the supplemental order is predicated, we find it unnecessary to consider other numerous questions raised by the petitioner.

I think that some of those statements by the court might give rise to apprehension on the part of some of the people who appear before the Commission, and still that does not in any way impugn the motives of the Commission in its decisions.

Mr. SADOWSKI. Any other questions?

That will be all, Mr. Kelley. In view of the lateness of the hour, and the fact that we have this bill up on the floor, I think we will have a quorum call most any minute. We will continue the hearings tomorrow morning at 10 o'clock.

(The tables referred to are entitled "Findings and Orders in All Cases Involving Food, Drugs, Therapeutic Devices, and Cosmetics Issued Subsequent to Enactment of the Wheeler-Lea Act," and "Analysis of Cases in Which Findings and Orders Were Issued Subsequent to Enactment of Wheeler-Lea Act Involving Food, Drugs, Therapeutic Devices, and Cosmetics, Showing Manner of Disposition and Courts' Disposition of Those Appealed" are as follows:)

Findings and orders in all cases involving food, drugs, therapeutic devices, and cosmetics issued subsequent to enactment of the Wheeler-Lea Act

Docket- et	Name	Date of order	Product	Manner of disposition	Court review
1846	Magnacoll, Inc.	Oct. 6, 1939	Therapeutic device	Admission answer	Petition for review dismissed.
2330	Yardley of London	Dec. 20, 1939	Cosmetics	Trial	
2442	Rartan Distillers Corp.	Dec. 3, 1938	Citilled spirits	do	
2445	General Distillers Corp.	Apr. 10, 1940	do	do	Order affirmed.
2509	Monica M. Rock	June 11, 1939	Medicinal preparation	do	
2620	West Penn Distilling Co.	May 9, 1938	Distilled spirits	Admission answer	
2681	John J. Kane	Feb. 23, 1939	Food flavors	Trial	Do.
2685	Korjena Medicine Co. et al.	Apr. 6, 1938	Medicinal preparation	do	
2720	Granada Vineyards, Inc.	July 21, 1938	Wine	do	
2743	Justin Haynes & Co.	Apr. 21, 1938	Medicinal preparation	do	Petition for review dismissed Order reversed.
2771	The Grove Laboratories, Inc.	Dec. 7, 1938	Drugs	Stipulation as to facts	
2779	Sterling Products Corp.	Sept. 12, 1939	Drugs	Trial	
2807	United Distilleries, Ltd.	June 23, 1938	Distilled spirits	do	Admission answer
2823	Soap Lake Products Corp.	Aug. 19, 1941	Medicinal preparation	do	
2832	Thorson's Soap Lake Products Co.	do	do	Trial	
2838	Bourjois, Inc.	June 30, 1938	Cosmetics	Admission answer	Do.
2841	George H. Lee Co.	do	Poultry remedy	do	
2859	Bell & Co., Inc.	Dec. 19, 1940	Medicinal preparation	do	
2862	H. R. Zimmer	July 29, 1938	Therapeutic device	do	Order affirmed.
2870	Magle Chemical Co.	June 15, 1938	Medicinal preparation	do	
2876	Reliable Specialty Corp.	Aug. 3, 1938	Medicinal preparations	do	
2894	Pro-Ker Laboratories, Inc.	Aug. 31, 1938	Medicinal preparation	do	Do.
2925	The Trex Co.	June 2, 1938	do	do	
2934	Lewyn Drug, Inc.	June 6, 1939	Medicinal preparation	Admission answer	
2953	Rocky Mountain Laboratories, Inc.	Mar. 29, 1938	Medicinal preparation	Trial	Petition for review dismissed Order reversed.
2957	Dr. W. B. Caldwell, Inc.	Mar. 8, 1939	do	do	
2979	Associated Laboratories, Inc.	July 20, 1943	do	do	
3009	Wain's Laboratory, Inc.	June 30, 1938	do	do	Stipulation as to facts
3012	Marvo Beauty Laboratories, Inc.	June 1, 1938	Cosmetic	Trial	
3030	Zo-Ro-Lo, Inc.	Aug. 12, 1939	Medicinal preparation	do	
3047	Selected Kentucky Distilleries, Inc.	Mar. 26, 1938	Distilled spirits	do	Admission answer
3051	Lantene Laboratories, Inc.	Apr. 1, 1939	Therapeutic device	do	
3055	Van-Tange Medicine Co., Inc.	Oct. 19, 1938	Medicinal preparation	Trial	
3062	J. Palazzolo	Apr. 19, 1939	Cosmetic	do	Do.
3072	Joseph C. Bradley et al.	Jan. 27, 1938	Therapeutic device	do	
3084	Warner's Renowned Remedies	June 13, 1938	Medicinal preparation	do	
3086	M. J. and H. J. Mayer & Co., Inc.	Jan. 7, 1941	Food	do	Petition for review dismissed.
3087	W. E. and M. E. Medicine Co.	Sept. 18, 1939	Medicinal preparation	do	
3093	United Corp. et al.	Aug. 2, 1939	Food	do	
3096	Chanel, Inc.	Sept. 27, 1939	Food	do	Stipulation as to facts
3100	Willard Tablet Co.	Oct. 15, 1938	Cosmetic	do	
3102	Ralston Purina Co.	Dec. 28, 1939	Medicinal preparation	do	
3104	Colonial Dames, Inc.	May 16, 1938	Dog food	do	Trial
3111	Deran Confectionery Co.	June 3, 1938	Cosmetics	Stipulation as to facts	
			Food	Trial	

3113	William A. Woodbury Sales Co., Inc.	Dec. 8, 1938	Cosmetics	do	
3120	Gotham Sales Co., Inc.	Sept. 3, 1938	Cosmetics and food	Stipulation as to facts	
3123	John Petrie	July 25, 1938	Medicinal preparations	Trial	
3158	George Rosenfeld	Apr. 11, 1939	Health books	do	
3185	Guy J. Banta	Jan. 11, 1939	Medicinal preparation	Admission answer	
3191	Morris R. Shapiro	Dec. 14, 1938	do	Trial	
3217	Kondt Co.	Sept. 12, 1941	Dog medicine	do	
3220	Tested Specialties Co.	Apr. 21, 1938	do	do	
3227	Politis Laboratories	June 20, 1939	Medicinal preparation	do	
3235	Earl C. Noyes	Dec. 21, 1938	Medicinal preparations	do	
3240	The National Scientific Products Co.	Jan. 19, 1939	Medicinal preparation	do	
3243	The Eta Company, Inc. et al.	June 30, 1938	Food	Stipulation as to facts	
3257	Dermaey Perfumers, Inc.	Apr. 13, 1938	Cosmetics	Admission answer	
3267	Sunbeam Laboratories	Jan. 5, 1939	do	Trial	
3274	Monroe Chemical Co. et al.	Mar. 8, 1940	Chemical	Stipulation as to facts	
3284	The Flora Cube Co., Inc.	Sept. 8, 1939	Medicinal preparation	Admission answer	
3291	Prestex Co.	July 16, 1940	do	Trial	Order affirmed.
3292	F. B. Products Co.	Dec. 13, 1938	do	Admission answer	
3298	Saks & Co.	Aug. 25, 1939	Perfumes	Trial	
3303	Hygienic Corp. of America	June 8, 1940	Medicinal preparations	do	
3308	Charles Atlas, Ltd.	Feb. 25, 1939	Health book	do	
3314	Primrose House, Inc.	Dec. 18, 1940	Cosmetics	do	
3316	Marvel Products Co.	Mar. 21, 1939	do	do	
3320	Kendall Co.	Nov. 29, 1940	Medicinal preparation	do	
3322	George Foster, Inc.	Apr. 6, 1938	Food products	Admission answer	
3325	Coty, Inc.	Oct. 12, 1939	Perfumes	Trial	Petition for review dismissed.
3333	William F. Craddock	Oct. 31, 1938	Medicinal preparations	Admission answer	
3334	E. R. Page Co., Inc.	Apr. 18, 1938	Medicinal preparation	do	
3337	Etablissements Rigaud, Inc.	Sept. 27, 1939	Perfume	Trial	Order modified.
3339	W. J. Bush & Co., Inc.	Mar. 8, 1939	Cosmetics	Stipulation as to facts	
3340	Callie E. Morris	Mar. 20, 1945	Therapeutic device	Trial	
3341	John H. Davis	Oct. 6, 1941	Perfumes	do	Order affirmed.
3342	Averbach Co., Inc.	Sept. 11, 1939	Food products	Admission answer	
3343	Horbigant, Inc.	Apr. 16, 1942	Perfume	Trial	Do.
3346	Adale Miller	July 21, 1939	Cosmetics	do	
3347	John F. Jelco Co., Inc.	Apr. 3, 1940	Food product	do	
3350	Nelle K. Wing	Apr. 25, 1938	Medicinal preparation	Admission answer	
3352	Fan Tan	Nov. 1, 1939	Cosmetics	do	
3354	Ostrex Co.	Aug. 8, 1939	Medicinal preparation	Stipulation as to facts	
3355	Western Refining Co., Inc.	Mar. 28, 1940	Medicinal preparations	Trial	
3361	Forsen Laboratories, Inc.	Apr. 10, 1940	do	do	
3365	Northwestern Yeast Co.	Dec. 12, 1938	do	Stipulation as to facts	
3378	Sroll Laboratories, Inc.	Feb. 6, 1939	do	Admission answer	
3389	Hall & Ruckel, Inc.	Dec. 27, 1940	Therapeutic device	Trial	
3390	Teolinda Mahler	June 28, 1938	Cosmetics	Admission answer	
3399	Metzler-McKean Corp.	Dec. 7, 1938	Food	Stipulation as to facts	
3408	Crete Mills	May 28, 1940	Medicinal preparation	Trial	
3415	American Clinical Laboratories, Inc.	Nov. 16, 1939	do	Admission answer	
3419	The Endura Corp.	Jan. 1, 1939	Cosmetic	do	Petition for review dismissed.
3420	Pianud, Inc.	Dec. 30, 1938	do	Stipulation as to facts	
3427	Pond's Extract Co.	Sept. 10, 1941	do	Trial and stipulation	

Findings and orders in all cases involving food, drugs, therapeutic devices, and cosmetics issued subsequent to enactment of the Wheeler-Lea Act—Continued

Docket	Name	Date of order	Product	Manner of disposition	Court review
3400	The Knox Co.	Jan. 31, 1939	Medicinal preparation	Stipulation as to facts	
3433	La Perla Vineyard Co.	Jan. 10, 1939	Wine	Admission answer	
3435	H. F. Allen	May 31, 1939	Medicinal products	Trial	
3438	Jergens-Woodbury Sales Corp.	Sept. 10, 1941	Cosmetics	Trial and stipulation	Order modified.
3444	Mary Rosenheimer	Oct. 7, 1938	Medicinal preparation	Admission answer	
3445	Grove Laboratories, Inc.	June 29, 1940	do	Stipulation as to facts	
3447	Dorothy Gray, Ltd., et al.	June 19, 1943	Cosmetic	do	
3448	Fred A. Stock	Aug. 9, 1938	Medicinal preparation	Admission answer	
3450	Josiah L. Jones	Dec. 13, 1938	Therapeutic device	Trial	
3451	Gravitic Life Ray Corp., Inc.	Dec. 22, 1939	do	Trial	
3455	Monticello Drug Co.	June 29, 1940	Medicinal preparation	Trial and stipulation	
3460	Carl W. Peters	Sept. 26, 1939	Therapeutic device	Admission answer	
3468	Waco Drug Co.	Aug. 1, 1939	Medicinal preparation	Trial	
3469	Patch Premek Corp.	Mar. 29, 1940	do	Admission answer	
3472	Stafford T. Mitchell	Dec. 6, 1939	Cosmetic	Trial	
3476	Nathan Levin	Sept. 7, 1938	Medicinal preparation	Admission answer	
3478	Eucozone Laboratories, Inc.	Mar. 19, 1941	do	Trial	
3480	DeKama, Inc.	Mar. 15, 1939	Cosmetic	Admission answer	
3483	Gates Medicine Co., Inc.	Oct. 4, 1941	Medicinal preparation	do	
3486	Rosemarie Lewis	Mar. 19, 1941	do	Trial	
3487	Floyd Irl Sorrells	Jan. 10, 1939	Foods	Admission answer	
3490	Vass Co., Inc.	Mar. 16, 1939	Medicinal preparation	Stipulation as to facts	
3500	Renard Sales Co., Inc.	Sept. 16, 1941	Cosmetics	Trial	
3512	Federick Cluthel, et al.	Apr. 10, 1939	Therapeutic device	Admission answer	
3513	Madam Marguerite Turnel, Inc.	Mar. 28, 1940	Cosmetic	do	
3523	Chicago Thermo-Magnetic Cushion Co.	Mar. 19, 1941	Therapeutic device	Trial	
3524	J. W. Cooper	Feb. 23, 1940	Cosmetic	do	
3533	Fred Adelman	Aug. 1, 1939	Therapeutic device	Admission answer	
3536	G. J. Tritico	Dec. 23, 1941	Medicinal preparation	Trial	
3538	Betty Wells Fowler	June 29, 1940	Cosmetic	do	
3566	Jefferson R. Brewster	July 11, 1940	Medicinal preparation	do	
3573	Miller Growers Association	Feb. 9, 1939	Food	Admission answer	
3575	Rose R. Scott	Feb. 6, 1939	Medicinal preparations	do	
3587	Kolyuos Co.	June 28, 1939	Cosmetic	Stipulation as to facts	Order reversed.
3593	Dearborn Supply Co.	Aug. 15, 1939	do	do	
3595	Gardner Remedies, Inc.	June 19, 1940	Medicinal preparations	Trial	
3596	R. L. Watkins Co.	Sept. 28, 1942	Cosmetic	do	
3597	The Knox Co.	Aug. 1, 1939	Medicinal preparation	Stipulation as to facts	
3598	Banfi Products Corp.	Feb. 10, 1939	do	Admission answer	
3602	Vallaghy Products, Inc.	Mar. 30, 1940	Cosmetic	do	
3608	R. O. Murphy	June 7, 1939	Medicinal preparation	Stipulation as to facts	
3609	Harry Gorov	Jan. 7, 1939	do	Admission answer	
3615	Clarel, Inc.	Oct. 8, 1941	Cosmetic	Trial	Order modified.

3626	J. V. Marrow Manufacturing Co.	Mar. 27, 1940	do	do	Order affirmed.
3626	Innocent Shepherd, Ltd.	Aug. 14, 1940	do	do	Order affirmed.
3625	Farfums Corday, Inc.	Sept. 27, 1939	do	do	
3639	Bristol-Myers Co.	May 7, 1943	Medicinal preparation	Stipulation as to facts.	
3645	Alfred Johnson Smith.	Mar. 1, 1939	Health book	Admission answer	
3648	Excelsior Laboratory, Inc.	Feb. 6, 1939	Medicinal preparation	do	Do. Petition for review dismissed.
3650	W. H. Constable Co., Ltd.	Mar. 27, 1939	Poultry remedies	do	
3651	Research Associates, Inc.	May 11, 1940	Cosmetic	Trial	
3653	Home Diathermy Co., Inc.	Nov. 20, 1940	Therapeutic device	do	
3660	Frederick A. Clarke	Aug. 7, 1945	Medicinal preparation	do	Order affirmed.
3663	Claro Laboratories, Inc.	Mar. 25, 1941	Cosmetic	do	
3664	E. W. Knowlton	Nov. 7, 1939	Medicinal preparation	Admission answer	
3665	L. Burman	June 30, 1941	do	Trial	
3666	Parfums Lengyel, Ltd.	Sept. 26, 1939	Perfumes	Stipulation as to facts.	Do. Petition for review dismissed.
3674	Menthob-Mulsion, Inc.	Jan. 16, 1940	Medicinal preparation	Trial	
3678	Alle-Rhume Remedy Co., Inc.	Aug. 25, 1939	do	Admission answer	
3679	Zendelias Products Corp.	Sept. 7, 1939	Medicinal preparations	do	
3680	Swamp Dixie Laboratories, Inc.	Feb. 27, 1939	Medicinal preparation	do	Order affirmed.
3682	Fresh Grown Preserve Corp.	Sept. 26, 1940	Food	Trial	
3695	The Renesol Corp.	July 6, 1942	Medicinal preparation	do	
3704	Anyline Electric Co.	May 8, 1939	Therapeutic device	Stipulation as to facts.	
3708	United Distributors, Inc.	Sept. 7, 1939	Medicinal preparation	do	Do. Petition for review dismissed.
3719	The Perasthman Co., Inc., et al.	Nov. 7, 1939	do	do	
3721	Morehouse Manufacturing Co.	Dec. 11, 1940	Cosmetic	Admission answer	
3724	Zo-Ak Co., Inc.	Dec. 19, 1939	Medicinal preparation	Stipulation as to facts.	
3726	Wallace G. Clark	Apr. 3, 1941	Cosmetic	Admission answer	Order affirmed.
3727	F. & F. Laboratories, Inc.	June 14, 1939	Medicinal preparation	Trial	
3729	United Drug Co.	Oct. 24, 1942	Cosmetic	Stipulation as to facts.	
3732	Marlborough Laboratories, Inc., et al.	Mar. 20, 1941	do	do	
3733	Cuban Health Products, Inc.	Oct. 10, 1939	Medicinal preparation	Stipulation as to facts.	Do. Petition for review dismissed.
3734	Affiliated Products, Inc.	Feb. 14, 1940	Cosmetic	do	
3735	Western Chemicals, Inc.	Mar. 2, 1942	Medicinal preparation	Trial	
3737	Harry Epstein	Aug. 1, 1939	do	Admission answer	
3741	Frye Company	Jan. 25, 1940	do	Trial	Order affirmed.
3743	Leon E. Van Laethon	Aug. 7, 1939	do	Admission answer	
3744	John B. Canepa Co.	Apr. 16, 1940	do	Trial	
3752	Dan M. Thompson	June 29, 1940	Food product	do	
3754	Wyeth Chemical Co.	July 7, 1939	Medicinal preparation	Stipulation as to facts.	Do. Petition for review dismissed.
3768	Pascal Co., Inc.	Apr. 19, 1941	Cosmetic	Trial	
3770	Lou Sterling et al.	Oct. 30, 1939	do	do	
3772	John B. Roche	July 9, 1940	Therapeutic device	Stipulation as to facts.	
3775	William G. Nash, Sr., et al.	May 6, 1943	Medicinal preparation	Admission answer	Order affirmed.
3777	H. P. Clearwater	Oct. 18, 1939	do	do	
3782	Federal Organization, Inc.	Aug. 2, 1939	Medicinal preparations	Admission answer	
3790	Buford & Owens College	Feb. 23, 1940	Cosmetics	do	
3791	McKesson & Robbins, Inc.	Dec. 28, 1939	Cosmetics	Stipulation as to facts.	Do. Petition for review dismissed.
3793	Gordon-Gordon, Ltd.	May 16, 1941	Cosmetics	Trial	
3794	Sara B. Plant et al.	June 19, 1942	do	do	
3815	Philip R. Park, Inc.	June 30, 1941	do	do	
3816	Anesthetic Laboratories, Inc.	Mar. 14, 1940	do	Admission answer	Do.
3819	John J. Fulton Co.	June 13, 1941	do	Trial	

Findings and orders in all cases involving food, drugs, therapeutic devices, and cosmetics issued subsequent to enactment of the Wheeler-Lea Act—Continued

Docket	Name	Date of order	Product	Manner of disposition	Court review
3821	Eloise Gauss	Aug. 23, 1939	Cosmetic	Admission answer	
3823	Arthur Longfield	Oct. 24, 1939	Food	do	
3826	Michael P. Braginti et al.	Dec. 28, 1939	Medicinal preparation	do	
3827	Howard D. Johnson Co.	do	Food	do	
3828	Sumlack Co.	Aug. 24, 1939	Medicinal preparation	Stipulation as to facts	
3841	J. V. Cordes	Sept. 18, 1941	do	Trial	
3847	Willard C. McAhren et al.	Nov. 15, 1939	do	Admission answer	
3848	Irving Soifonski	Oct. 3, 1939	do	do	
3851	Harry S. Benham	Sept. 9, 1939	do	do	
3854	Leland F. Bonham	Sept. 11, 1939	do	do	
3856	Earl Aronberg	Sept. 7, 1941	do	Trial	
3857	G. Bernard	Sept. 7, 1939	do	Admission answer	
3861	W. H. Shanks et al.	Dec. 20, 1939	Dog medicine	do	
3863	Robert C. Oberlin	Sept. 18, 1939	Medicinal preparations	do	
3867	Edward L. Jenkins et al.	Nov. 7, 1939	Medicinal preparation	do	
3879	Charles L. Klapp	June 26, 1940	do	do	
3883	Petersime Incubator Co.	Oct. 28, 1939	Therapeutic device	do	
3884	Vitaphore Appliances, Inc.	Apr. 3, 1941	do	Trial	
3887	John C. Johnson	Dec. 19, 1939	Medicinal preparation	Admission answer	
3890	Fink & Co., Inc.	Apr. 3, 1941	Food product and cosmetic	Trial	
3893	Rose Heifler	Apr. 15, 1940	Cosmetic	Admission answer	
3894	The Kendall Co.	June 19, 1940	do	do	
3895	David H. Fulton	Dec. 31, 1940	Medicinal preparation	Stipulation as to facts	
3904	Roxanna Canning Co.	Apr. 23, 1940	Dog food	Admission answer	
3906	Veronica Ignatovitch	July 9, 1940	Cosmetic	Stipulation as to facts	
3909	Bathjen Bros., Inc.	Feb. 29, 1940	Distilled liquors	Admission answer	
3917	Lady Esther	May 31, 1940	Cosmetic	Stipulation as to facts	
3918	American Distributors, Inc.	Mar. 13, 1940	Medicinal preparation	Trial	
3923	Charles of the Ritz Distributors' Corp.	May 12, 1942	Cosmetic	Admission answer	
3932	W. T. Wagner's Sons Co.	Feb. 23, 1940	Food	Admission answer	Do.
3933	Jessie F. Springer	Mar. 9, 1940	Medical book	do	
3934	Witold, Inc.	May 23, 1941	Cosmetics	Trial	
3940	Indian River Medicine Co.	Apr. 17, 1940	Medicinal preparation	Admission answer	
3945	Pasadena Products, Inc.	Feb. 17, 1943	do	Trial	
3950	Jean Ferrell, Inc.	Mar. 9, 1940	Cosmetics	Admission answer	
3959	Charles H. Phillips Chemical Co.	Dec. 12, 1940	Medicinal preparations	Stipulation as to facts	
3964	Fong Poy	May 24, 1941	Cosmetic	Trial	
3966	A. Sartorius & Co., Inc.	Dec. 11, 1940	Cosmetic	Stipulation as to facts	Do.
3969	Neo-Vim Co. et al.	June 14, 1941	Cosmetic and medicinal preparation	Admission answer	
3972	D. D. D. Corp.	Apr. 19, 1941	Medicinal preparation	Trial	
3976	Tommy Loughran	Oct. 21, 1940	Health books	Admission answer	
3988	Dr. Van Vleet Co.	May 13, 1940	Medicinal preparations	do	Order modified.

3992	Theodore Radin, Inc.	do	do	do	Stipulation as to facts	
3993	Aurine Co., Inc.	June 26, 1940	Medicinal preparation	do	Admission answer	
3998	Thomson-King & Co., Inc., et al.	June 12, 1941	Cosmetics	do	Admission answer	
4002	Blanche Kaplan	Apr. 15, 1940	Medicinal preparation	do	do	
4003	Michael S. Chiolak	June 25, 1940	do	do	do	
4004	The Chapman Health Products Co.	May 2, 1940	do	do	do	
4005	Dr. Pierre Chemical Co.	Sept. 27, 1940	do	do	Stipulation as to facts	
4021	Purity Products, Inc., et al.	Feb. 9, 1943	do	do	Trial	
4028	George C. Huskins	July 9, 1940	Medicinal preparation	do	Admission answer	
4031	Lehand F. Benham	Apr. 29, 1940	do	do	do	
4035	William S. McClymonds	May 1, 1940	do	do	do	
4049	The Hydrosol Co.	May 28, 1940	Medicinal preparations	do	do	
4053	Edwin L. Lelsening et al.	June 11, 1940	Medicinal preparation	do	do	
4057	Howard L. Brewer et al.	May 13, 1940	do	do	do	
4061	Sekor Corp.	Sept. 18, 1940	do	do	Stipulation as to facts	
4062	S. M. Laboratories Co.	Mar. 13, 1940	Medicinal preparations	do	Admission answer	
4063	Warner's Renowned Remedies Co.	Mar. 23, 1942	do	do	Trial	
4066	William W. Kelso	June 26, 1940	Medicinal preparation	do	Admission answer	Order affirmed.
4067	Herb Juice Penol Co., Inc.	June 6, 1940	do	do	do	
4074	Purex Corporation, Ltd.	Jan. 13, 1941	Germicide	do	Trial	
4076	The Marine Co., Inc.	June 29, 1940	Medicinal preparation	do	Stipulation as to facts	
4078	Thermalaid Method, Inc.	July 25, 1941	Therapeutic device	do	do	
4079	William Clarence Ohlendorf	Aug. 19, 1941	Medicinal preparation	do	Trial	
4101	Hiram Carter, Inc.	Jan. 12, 1942	do	do	do	
4127	J. K. Olney, Sr., et al.	June 11, 1941	do	do	do	
4128	Petalskin Toiletries, Inc.	June 15, 1941	Cosmetics	do	do	
4129	Post Institute Sales Corp.	Dec. 16, 1941	Medicinal preparation	do	do	
4130	Stanley Laboratories, Inc., et al.	Apr. 1, 1942	do	do	do	
4137	John H. Oosterhaus	June 30, 1941	do	do	do	
4144	Electrolysis Associates, Inc.	Dec. 11, 1940	Therapeutic device	do	Admission answer	
4146	Omega Manufacturing Co., Inc.	June 12, 1941	do	do	Trial	
4147	George D. Moorman et al.	June 29, 1940	Medicinal preparation	do	Admission answer	
4152	May's Cut Rate Drug Co.	July 6, 1940	do	do	do	
4153	May's Cut Rate Drug Co. of Charleston	do	do	do	do	
4154	Pittsburgh Cut Rate Drug Co.	do	do	do	do	
4155	Cecil Dwight Kitchen	July 9, 1940	Cosmetic	do	do	
4159	American Medicinal Products, Inc.	Apr. 30, 1941	Medicinal preparation	do	Trial	
4160	I. Ralph Weinstein	Nov. 19, 1940	do	do	Admission answer	
4161	Frank B. Moran	June 8, 1943	Therapeutic device	do	Trial	
4185	National Mineral Co.	Mar. 12, 1941	Cosmetic	do	Stipulation as to facts	
4194	Kongco Chemical Co., Inc.	Dec. 28, 1940	do	do	Admission answer	
4196	Nek A. George et al.	Jan. 29, 1941	Medicinal preparation	do	Stipulation as to facts	
4197	Stefan Wroblewski et al.	July 24, 1941	Medicinal preparations	do	do	
4197	Sterling Products et al.	May 25, 1942	Cosmetic	do	do	
4200	American Drug & Chemical Co.	Mar. 19, 1941	Medicinal preparations	do	do	
4202	Louis Cohen	Sept. 18, 1940	Medicinal preparation	do	Admission answer	
4203	Wain's Laboratories, Inc.	Oct. 18, 1940	do	do	do	
4208	W. S. McClymonds et al.	Sept. 17, 1941	do	do	Stipulation as to facts	
4211	Lehard Godlieb	Oct. 16, 1940	do	do	Admission answer	
4213	Howard Deckelbaum	Oct. 21, 1940	do	do	do	
4228	D. J. Mahler Co., Inc.	June 11, 1941	Therapeutic device	do	Trial	
4230	The Sebrone Co. et al.	May 1, 1942	Cosmetic	do	do	Do.

Petition for review dismissed.

Do.
Order affirmed.

Do.

Do.

Findings and orders in all cases involving food, drugs, therapeutic devices, and cosmetics issued subsequent to enactment of the Wheeler-Lea Act—Continued

Docket	Name	Date of order	Product	Manner of disposition	Court review
4241	Scholl Manufacturing Co., Inc.	Dec. 2, 1940	Therapeutic device	Admission answer	
4246	Frank Spors	Oct. 9, 1940	Medicinal preparation	do	
4247	Lambert Agin	Aug. 12, 1941	do	do	
4254	Helena Rubinstein, Inc.	July 14, 1941	Cosmetic	Stipulation as to facts	
4260	Colonial Drug Co. et al.	May 16, 1941	Medicinal preparation	Admission answer	
4261	Blanche Kahlin	Oct. 9, 1940	do	do	
4262	Rene F. Balditt	Oct. 23, 1940	do	do	
4264	Kuhn Remedy Co.	Nov. 29, 1940	do	do	
4271	National Proprietaries, Inc.	Jan. 13, 1941	do	do	
4289	E. R. Davis	Jan. 7, 1942	do	Trial	
4291	Jacob L. Goldman	Dec. 4, 1940	Therapeutic device	Admission answer	
4301	Gates Medicine Co., Inc.	Aug. 6, 1941	Medicinal preparation	Trial	
4314	Crazy Water Co. et al.	Dec. 12, 1940	do	Stipulation as to facts	
4316	Gene Hughes Drug Stores, Inc., et al.	July 6, 1942	do	do	
4317	Mck. Edwards	Feb. 9, 1942	do	Trial	
4327	Clara Stanton	Nov. 18, 1941	do	do	Order affirmed.
4328	Gland Estemeter Corp.	June 13, 1941	Therapeutic device	Stipulation as to facts	
4329	The Revigator Corp.	Feb. 5, 1941	Medicinal preparation	Admission answer	
4330	E. B. Hall	do	do	do	
4332	Healthaids, Inc.	Jan. 18, 1945	do	Trial	
4342	Rex Drug Company et al.	July 11, 1941	do	Admission answer	
4343	Max Caplan	May 16, 1941	do	do	
4345	Sherry's Cut Rate Drug Co., Inc.	Apr. 19, 1941	do	do	
4348	Cutter Laboratories	Aug. 14, 1942	do	Trial	
4352	Harry S. Benham et al.	Jan. 13, 1941	do	Admission answer	
4353	Julius Miller et al.	Dec. 12, 1940	do	do	
4364	Edwin L. Loiseuring	Dec. 28, 1940	do	do	
4366	Carl D. Bates	Feb. 10, 1941	do	do	
4368	Charles Keller	Dec. 12, 1940	do	do	
4371	Chocolate Products Co.	Dec. 4, 1941	do	Stipulation as to facts	
4373	R. G. Bowre et al.	Jan. 11, 1941	do	Admission answer	
4382	Erle Laboratories, Inc.	Mar. 21, 1941	do	do	
4387	The Ru-Ex Co.	Feb. 27, 1941	do	do	
4397	Frank Spors	Jan. 21, 1941	do	do	
4399	Herolin Company, Inc., et al.	Mar. 9, 1942	do	Stipulation as to facts	
4402	Charles W. Hayssen	Oct. 8, 1945	do	Trial	
4403	Victoria Chemical Co. et al.	Mar. 12, 1941	do	Stipulation as to facts	
4406	Hartig Drug Co.	Apr. 26, 1941	do	Admission answer	
4407	Ultra-Violet Products, Inc.	June 8, 1942	Therapeutic device	Trial	
4408	Health Ray Manufacturing Co., Inc.	Mar. 13, 1941	do	Stipulation as to facts	
4418	Hy-Phen Corp.	June 30, 1941	Medicinal preparation	Admission answer	
4419	Cora Lee Wiley	Nov. 2, 1942	do	do	Order modified.
4421	Ozon Chemical Co., Inc.	Sept. 5, 1941	do	Trial	

4422	The Thomas Management Corp. et al.	June 5, 1942	Medicinal preparations	Trial and stipulation	
4424	Ethel Bolamy, Inc.	Apr. 28, 1941	Cosmetic	Admission answer	
4425	National Distillers Products Corp.	July 30, 1941	Food	Stipulation as to facts	
4428	Edward S. Rose	July 25, 1941	Medicinal preparation	Admission answer	
4431	Robert E. Overell	Sept. 12, 1941	do	Stipulation as to facts	
4432	Medora Whitney	Apr. 25, 1941	do	Admission answer	
4446	J. H. Camp	Mar. 12, 1941	do	Stipulation as to facts	
4447	Montgomery Ward & Co.	June 23, 1942	do	Trial	
4449	Jane Blanchard Geary	Apr. 24, 1941	do	Stipulation as to facts	
4451	Beeman's Laboratory, Inc.	Apr. 13, 1941	do	Admission answer	
4453	United Dinthern, Inc.	July 20, 1942	Therapeutic device	Trial	
4460	Charles A. Bilzman	May 1, 1945	Medicinal preparations	Admission answer	
4476	Arthur Jacobson	Jan. 7, 1942	Health books	Trial	
4479	Ben Gordon et al.	July 10, 1941	Medicinal preparation	Admission answer	
4482	Scientific Manufacturing Co., Inc.	May 11, 1944	Medicinal preparations	Trial	
4484	Casimiro Murojo	Aug. 7, 1941	Cosmetic	Admission answer	
4485	W. K. Sterline et al.	Sept. 23, 1941	Medicinal preparation	Stipulation as to facts	
4491	Charles Campbell Burtinfield, Sr.	Nov. 17, 1941	do	Admission answer	
4501	Electro-Health Appliance Co.	Nov. 2, 1942	Therapeutic device	do	
4504	Philip R. Park, Inc., et al.	Apr. 27, 1943	Medicinal preparation	Admission answer	
4510	David L. Silver et al.	Oct. 14, 1941	Cosmetics	Stipulation as to facts	
4511	Parfum L'Orle, Inc.	Mar. 11, 1943	Medicinal preparation	Admission answer	
4512	Mineral Wells Crystal Producers, Inc.	Nov. 14, 1941	do	do	
4527	Ferd T. Hopkins	Nov. 13, 1941	Medicinal preparations	Stipulation as to facts	
4530	Charles Roehm	May 11, 1942	do	Admission answer	
4531	Al Modey Loughney	Apr. 20, 1942	do	do	
4539	James R. Middlebrook	Dec. 11, 1941	Medicinal preparation	Stipulation as to facts	
4541	Battle Creek Drugs, Inc., et al.	Feb. 17, 1942	Therapeutic device	Admission answer	
4542	Nolan B. Stadley	Sept. 23, 1941	do	Trial	
4543	George S. Mogliner et al.	Aug. 31, 1942	Medicinal preparation	do	
4549	J. E. Todd, Inc.	July 27, 1943	do	Stipulation as to facts	
4552	Molvin V. Eisenberg, et al.	Dec. 16, 1941	Medicinal preparations	Admission answer	
4553	Grant T. Whiteside	Dec. 11, 1941	Medicinal preparation	Trial	
4567	W. A. Houston	June 2, 1942	Cosmetic	do	
4568	Parfums Roini, Inc.	Mar. 2, 1942	Medicinal preparation	Admission answer	
4570	Charles Shrader	Nov. 26, 1941	Beer	Trial	
4572	Manhattan Brewing Co.	Sept. 7, 1943	Medicinal preparation	Stipulation as to facts	
4574	J. D. Jacobs et al.	Dec. 9, 1941	Livestock spray	Trial	
4581	Gulf Oil Corp.	Apr. 4, 1944	Medicinal preparation	Stipulation as to facts	
4584	Codrin Corp.	May 5, 1942	do	Admission answer	
4589	Pratt Food Co.	Mar. 9, 1942	do	Stipulation as to facts	
4601	Nature's Herb Co.	Jan. 9, 1942	do	Trial	
4607	Mar-Gol Health Products Corp.	July 14, 1942	Therapeutic device	do	
4613	Charlotte Brandenberg	Apr. 20, 1942	Medicinal preparation	Admission answer	
4615	Merritt Freeman Butler	Feb. 16, 1942	do	do	
4622	John B. Armstrong	Nov. 18, 1944	Food	Trial	
4627	General Foods Corp.	Nov. 18, 1944	Therapeutic device	do	
4630	Atmoray, Inc., et al.	Apr. 2, 1943	Medicinal preparation	do	
4635	Pabst Pharmaceutical Co., Inc.	July 3, 1941	Cosmetic	Admission answer	
4632	Clifford S. Donnell	Feb. 9, 1942	Medicinal preparation	do	
4662	Pat V. James	Aug. 14, 1942	Cosmetic	Stipulation as to facts	
4663	Irvin A. Willat	Sept. 21, 1942	do	do	

Order affirmed.

Do.

Petition for review dismissed

Order affirmed.

Findings and orders in all cases involving food, drugs, therapeutic devices, and cosmetics issued subsequent to enactment of the Wheeler-Lea Act—Continued

Docket	Name	Date of order	Product	Manner of disposition	Court review
4666	Di-Function Co., Inc.	Nov. 2, 1942	Medicinal preparation	Admission answer	
4682	Kola Astier Corp.	June 24, 1943	do	Trial	
4683	The May Department Stores Co. et al.	Oct. 20, 1942	Therapeutic device	Stipulation as to facts	
4686	Baer Laboratories, Inc.	Sept. 7, 1942	Medicinal preparation	Admission answer	
4702	Hollywood Magic Garment Co.	Jan. 19, 1943	Therapeutic device	Trial	
4704	George Von Nida et al.	Jan. 26, 1943	Medicinal preparation	Stipulation as to facts	
4711	Arthur H. Ferber	Jan. 19, 1943	Food	Trial	
4711	E. Griffiths Hughes, Inc.	Apr. 25, 1945	Medicinal preparation	Stipulation as to facts	
4722	Milton Irwin et al.	Apr. 20, 1943	do	Trial	
4728	Montgomery Ward & Co., Inc.	Oct. 12, 1942	Cosmetics	Stipulation as to facts	
4729	Phil Howe et al.	May 6, 1943	do	Trial	
4730	Indian River Fruit & Vegetable Distributors, Inc.	June 6, 1943	Food	Admission answer	
4731	Giroux Co., Inc.	Sept. 1, 1942	do	Stipulation as to facts	
4733	Royal Lee	Feb. 28, 1945	Medicinal preparations	Trial	
4739	Bewley Mills	Sept. 21, 1942	Food	Stipulation as to facts	
4741	Automatic Electrical Devices Co.	June 29, 1945	Therapeutic device	do	Order affirmed.
4748	Edwin Tom	Oct. 19, 1942	Medicinal preparation	do	Order modified.
4749	Associated Distributors, Inc., et al.	May 18, 1943	Cosmetic	do	
4753	F. A. Stuart Co.	Mar. 11, 1943	Medicinal preparation	Admission answer	
4755	Zonite Products Corp.	May 17, 1944	do	Stipulation as to facts	
4759	Charboy Products, Inc.	May 20, 1944	do	do	
4761	The Dr. D. A. Williams Co.	Apr. 19, 1945	do	Trial	
4761	Bertha M. Urban	July 21, 1943	do	do	
4766	Philip Barrell	Jan. 23, 1945	do	do	
4767	The Jung Arch Brace Co.	May 2, 1945	Therapeutic devices	Stipulation as to facts	
4811	Vivian S. Nash	Oct. 26, 1942	Cosmetic	Admission answer	
4815	Lekas and Drivas	July 7, 1943	Food	Trial	
4816	Thomas E. Collins	Oct. 27, 1943	Medicinal preparation	do	Do.
4817	Pow-A-Tan Medicine Co.	Apr. 22, 1943	do	Admission answer	
4818	Ed. W. Arnold Co.	Dec. 20, 1944	Therapeutic device	Trial	
4822	Samuel Perloff	July 10, 1943	Food	do	
4824	Frattelli Branca & Co., Inc.	June 9, 1943	Medicinal preparation	Stipulation as to facts	
4836	J. R. Hodges	July 27, 1943	do	do	Order affirmed.
4837	William J. Cooksey	Oct. 27, 1943	do	Trial	
4853	Ulricl Medicine Co., Inc.	Oct. 18, 1943	do	do	
4858	The electrovita Sales Co.	Aug. 3, 1943	do	do	
4865	Leonard Block et al.	Apr. 30, 1944	do	Stipulation as to facts	
4866	M. G. Neuman	June 1, 1944	Medicinal preparation and cosmetics	Trial	
4868	Michael E. Lee	Oct. 19, 1943	Medicinal preparation	do	
4869	Georgie A. Coleman	Aug. 30, 1945	do	do	
4882	C. H. Stemmons et al.	June 27, 1944	Therapeutic device	do	
4886	Delmar N. Randall	Oct. 9, 1944	do	do	

4893	J. H. Camp	June 27, 1944	Medical preparation	Stipulation as to facts
4894	Ostrex Co., Inc., et al	Mar. 21, 1945	Medical preparation	do
4898	The Carley Co.	Oct. 18, 1944	Food	Trial
4901	Home Diathermy, Inc., et al	Jan. 13, 1944	Therapeutic device	Stipulation as to facts
4912	Standard Chemical Manufacturing Co.	July 11, 1945	Medical preparations	do
4923	Harkley Sales, Inc., et al	Jan. 18, 1945	do	Trial
4926	McNell Drug Co., Inc.	Jan. 16, 1943	Medical preparation	Admission answer
4928	M. L. Kay et al	May 6, 1943	Cosmetic	do
4929	Beatrice Kornstein	Sept. 27, 1943	Medical preparation	do
4927	The Adlerika Co.	July 11, 1945	do	Stipulation as to facts
4940	Roy A. Whipple et al	Nov. 30, 1943	Therapeutic device	Admission answer
4942	L. R. Heyman et al	June 19, 1943	Cosmetics	do
4966	L. R. Kallman	Apr. 11, 1945	Cosmetic	Trial
4967	Helen E. Hoeck et al	Jan. 20, 1945	Food	Admission answer
4980	Henry P. Kinneke	Oct. 5, 1943	Food	Stipulation as to facts
4984	Francis R. Hillyard, Sr., et al	Apr. 7, 1945	Therapeutic device	Trial
4990	Donald N. MacDougall, et al	Apr. 11, 1941	Food	do
5000	Bishop & Babbitt, Inc	do	do	do
5028	Harvest House	Nov. 28, 1945	Health books	do
5037	Detroit Soda Products Co.	Nov. 28, 1945	Medical preparation	Admission answer
5039	Trans-Pac Services, Inc., et al	June 7, 1944	do	do
5044	Mayo Brothers Vitamins, Inc., et al	Feb. 9, 1945	Medical preparations	Stipulation as to facts
5051	All Rosenfeld, Inc., et al	Apr. 23, 1945	Cosmetics	Trial
5052	Montgomery Ward & Co.	Apr. 6, 1945	Medical preparations	Stipulation as to facts
5054	Kay Laboratories, Inc., et al	Dec. 21, 1941	Medical preparation	Admission answer
5064	R. C. Miller	Dec. 3, 1945	do	Trial
5072	Brooks Appliance Co.	Jan. 27, 1941	Therapeutic device	Stipulation as to facts
5089	William H. Howe	Mar. 13, 1945	Medical preparation	Trial
5091	Gladys Goldberg	Sept. 7, 1944	do	Admission answer
5094	Imperial Drug Exchange et al	May 9, 1944	do	do
5114	Valentine Greenwald	Oct. 1, 1945	Medical preparations	do
5132	A. T. Wilson	July 12, 1945	Medical preparation	do
5137	Carlton Routhahn	Sept. 7, 1944	do	do
5145	Rex Diathermy Corp.	June 26, 1944	Therapeutic device	do
5146	Sylvia Pietri	Feb. 6, 1945	Cosmetic	do
5216	Gillian Medicine Co., Inc., et al	May 10, 1945	Medical preparation	do
5227	Joseph Triner Corp.	June 27, 1945	do	do
5236	George F. Hauptman	Oct. 1, 1945	do	do
5249	Gustave Goldstein	Apr. 27, 1945	Cosmetics	Stipulation as to facts
5305	Olive L. Richards	Dec. 10, 1945	do	do
5307	William M. Stone	Dec. 21, 1945	Therapeutic device	Admission answer
5355	Reljuene Manufacturing Co.	Nov. 28, 1945	Cosmetic	do

Analysis of cases in which findings and orders were issued subsequent to enactment of Wheeler-Lea Act, involving food, drugs, therapeutic devices, and cosmetics, showing manner of disposition and court's disposition of those appealed

Total number of cases.....	462.
Number disposed of on admission answers.....	180, or 39 percent.
Number disposed of on stipulations as to the facts.....	97, or 21 percent.
Number disposed of on admission answers and stipulations as to the facts.....	277, or 60 percent.
Number disposed of by trial.....	185, or 40 percent.
Number disposed of by trial which were not appealed.....	141, or 76 percent.
Number appealed to circuit court of appeals.....	43.
Number affirmed or petitions for review dismissed.....	34.
Number modified.....	7.
Number reversed.....	2.
Number of formal complaints dismissed or closed by the Commission	58.

(Thereupon, at 11:55 a. m., Wednesday, February 27, 1946, the committee recessed until 10 a. m., Thursday, February 28, 1946.)

AMEND FEDERAL TRADE COMMISSION ACT

THURSDAY, FEBRUARY 28, 1946

HOUSE OF REPRESENTATIVES,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D. C.

The subcommittee reconvened at 10 a. m., Hon. George G. Sadowski, chairman of the subcommittee, presiding.

Mr. SADOWSKI. The subcommittee will come to order.

STATEMENT OF WALTER B. WOODEN, ASSISTANT CHIEF COUNSEL, FEDERAL TRADE COMMISSION

Mr. SADOWSKI. Will you state your name and the organization you represent.

Mr. WOODEN. My name is Walter B. Wooden. I am one of the assistant chief counsel of the Federal Trade Commission, and have held that position since 1939.

During that time I have been in charge of the Commission's trial work, having to do primarily with combinations in restraint of trade, price-fixing cases, basing-point cases, and violations of the price discrimination sections and other sections of the Robinson-Patman Act.

In that connection, I have handled a number of such cases before the appellate courts.

Several months ago I was placed in charge of all of the appellate work of the Commission.

Prior to 1939 I had been an attorney on the staff of the Commission, ever since the Commission was formed in 1915.

Mr. Kelley pointed out to the committee yesterday that the necessary implication of any suggestion that the Commission decides its factual issues upon any basis other than that of the preponderance of the evidence was that the Commission was not intellectually honest in reaching those decisions. I want to call the committee's attention in that connection, to a particular case which illustrates how the Commission goes about reaching its conclusions on the facts.

This was a case that was decided on May 3, 1944, and is known as the *Listerine case*, Docket 4232. Only four Commissioners participated in that decision, Judge Davis being absent on account of illness, but there were four opinions, three of which united in dismissing the case.

In the concurring opinion of Commissioner Ferguson, he said, and I quote:

It is the duty of the Commission to decide issues of fact, whether or not medical or scientific questions are involved, by the greater weight of the evidence, the burden of proof being on the Commission.

Commissioner March, in his concurring opinion, concluded that, and I quote:

The allegations in the complaint are not sustained by the greater weight of the evidence.

Commissioner Freer also made a very detailed analysis of the evidence, pro and con, in his concurring opinion.

Commissioner Ayres, however, dissented from the majority as to what the weight of the evidence was in the case, and after he had analyzed it in detail.

I call this case to the committee's attention, because it affirmatively shows that the Commission does act upon the weight and the preponderance of the evidence. And that was a case that came up before this bill was introduced. That case emphasizes and it illustrates the obvious fact that it is impossible for the several Commissioners to apply any rule other than that of the preponderating evidence without automatically questioning the good faith with which they acted in reaching their several conclusions.

Mr. REECE. May I interrupt, if the interruption does not disturb you?

Does the law require the preponderance of the evidence rule to be followed?

Mr. WOODEN. The law of good faith requires it, and it is implicit in any trial tribunal. Whether it is required by statute or not, it is there and must be there unless you are willing to question the good faith of the tribunal in reaching its conclusion on the preponderance of the evidence.

Mr. REECE. But in the event a defendant felt that the preponderance rule had not been followed, would he have a right to appeal to the court for a determination of that question?

Mr. WOODEN. Of the preponderance? Not under the statute as it now stands. And it is to be the burden of my statement that that should remain as it is.

Mr. REECE. That would seem to me to be really the important consideration involved in connection with this part of the bill.

Mr. WOODEN. It is.

Mr. REECE. There is frequently a difference of opinion among Commissioners, a difference of opinion among the judges on the bench, and, however conscientiously and capably a tribunal, commission, or judicial body, may undertake to adjudicate the questions at issue, the defendant, or litigant, may feel aggrieved, and he may have great interests involved; and concurrently, a public interest may be involved and what seems to me to be important in connection with the consideration of this bill, not so much the manner in which the Commission adjudicates and reaches its decision but whether the defendant or litigant, if he should feel aggrieved or feel his interests had been prejudiced, that he would have some right of appeal to the court for the determination of the issues involved in the case.

Mr. WOODEN. He has now the right of appeal, the same kind of appellate right that a defendant has from a jury verdict.

It seems to me very logical that if the verdict of a jury, supported by substantial evidence, is binding on the Appellate Court, that the verdict of a special agency, experienced and expert, should be given the same status.

Mr. REECE. Might not this difference enter into the two cases: a jury hears the witnesses and sees the witnesses. The judge presides over the case. The judge and jury are enabled to evaluate the personal reactions and the probity of the evidence, whereas in a proceeding before the Commission, the evidence is taken by an examiner, so that the case comes before the Commission on brief and arguments so that the Commission does not have opportunity that the jury and the original trial judge have in a case of evaluating the witnesses and evidence by personal observation. In a measure the Commission is sitting, we should not say as an appellate agency, but as an agency which is reaching a determination from the record itself and not from the evidence given in person by the witnesses.

I would like your reaction on that.

Mr. WOODEN. You have a similar situation where questions are referred to a master by the court, and the court does not see the witnesses there and has to pass judgment upon the record.

Mr. O'HARA. That is the unusual rather than the usual trial of civil matters.

Mr. WOODEN. I would not say that it is so very unusual, not very rare at all. Provision is made for it in the rules of civil procedure, but, not only that, the findings of the master on questions of fact are, by the rules, made conclusive unless they are clearly erroneous.

Mr. REECE. What would be the injury or danger of harm that might be wrought by providing, or making possible, an appeal to the courts in the event the litigant felt that an error or mistake had been made?

Mr. WOODEN. Well, it would simply give the litigants a second trial on the same record that he had before, and it would put the Federal Trade Commission through the same experience and cycle of experience that the Interstate Commerce Commission went through 30 or 40 years ago. That is just what happened to it, because the courts undertook to substitute their judgment on the facts for those of the Interstate Commerce Commission.

And it seems to me that when the Congress has conferred upon this Commission the functions that it has, and the powers that it has, that to adopt this preponderance rule is to simply say, "We do not trust you to follow the preponderance rule in the trial of your cases, and so we are going to give the courts a veto power to see whether you have actually decided according to the preponderance of the evidence, and not according to substantial evidence."

Some of these things are anticipatory of things that I expect to treat in my prepared statement.

Mr. O'HARA. I would like to ask a couple of questions, if you please.

Is it actually true that in the appeal from these cases from the Commission that you are in the same position that you are in a trial of a jury case, so far as the record is concerned?

Mr. WOODEN. Well, there is not any doubt that the Commissioners do not see the witnesses as they testify. That is very plain. There is that difference, but, after all, it is a question of balancing the pros and cons of a situation like this. And if the Congress wants the Commission to do the job of showing what the facts are, and finding what the facts are, it is not possible, humanly possible, for the Commissioners to hear every witness testifying in every case. There is some give-and-take in this proposition. You cannot find perfection. If

the fact that the Commission is one step removed from personal observation of the witnesses be an imperfection, how do you expect to correct it by a trial de novo before an appellate court which would be two steps removed from such observation?

Mr. O'HARA. How many cases are disposed of by the Commission by trial per year, the average number?

Mr. WOODEN. Well, I can only guess at it.

Mr. O'HARA. Your best estimate of it.

Mr. WOODEN. My guess is about 200.

Mr. O'HARA. About 200 a year?

Mr. WOODEN. Those involve the final decisions. That many cases are decided by the Commission per year. There are other cases that are being heard all of the time where the Commissioners, personally, cannot, of course, hear the witnesses themselves.

Mr. O'HARA. Why do you labor the point, as Mr. Kelley did yesterday, that the integrity of the Commission is involved, because some one introduces a bill, such as Mr. Reece has, to change the rules so as to impress the preponderance of evidence rule, that that is an attack upon the integrity of the Commission?

I mean, it is just beyond my understanding to comprehend that viewpoint.

Mr. WOODEN. Well, I think the express language of the proponents of the bill is susceptible to no other interpretation, for one thing. But I also say that if they did not say anything of that sort, the necessary implication of one who says that we have got to have a preponderance rule for appellate purposes because we are afraid the Commission does not apply that rule for trial purposes, that is implicitly and necessarily, in my judgment, a challenge to the mental integrity of the Commission.

Mr. O'HARA. Let me say that I think I would go a step farther, if I was the author of this bill, and have a trial de novo provision as an alternate, if desired, let me say, Mr. Wooden, so that you will understand, from any administrative decision so that you would not think that it is personal. It is not personal. That is the way I, personally, feel.

I think we have reached a point in the administrative law and its effect in this country that that is my viewpoint very definitely on any administrative body.

Mr. WOODEN. In that connection, it raises a question why the Federal Trade Commission should be singled out for special attention by a special bill when there is a bill that would apply to all administrative agencies pending.

Mr. O'HARA. Let me say, Mr. Wooden, that I do not blame you for feeling that way, because in treating this subject, in any questions that I may have asked, I am dealing with the whole subject of administrative law, and not just the matter of the Federal Trade Commission. It is not a personal matter with me at all.

Mr. REECE. I do not wish to interrupt, and I do so with some embarrassment. Mr. Wooden, without your intending to do so, I think the statement that you make and the one that my good friend Bill Kelley makes suggesting that the proposal that the law be changed to require the preponderance of evidence rule to be followed impugns the Commission, in a measure, impugns my purpose in intro-

ducing the bill as well as the purpose of the witnesses in defending it. It certainly is not my purpose in introducing the bill to, in any way, impugn, or even reflect upon, the Commission or its work and I am confident none of the witnesses intended to do so. The law now only requires, according to the report which the Commission submitted, the evidence rule to be followed; that is, "The Commission's findings as to facts, the statute provides, 'If supported by evidence, shall be conclusive.'" And the suggestion that it be written into the law that the preponderance rule shall be followed when we have legislation up dealing with this subject, I do not construe to be an indication that the Commission has been derelict in its work, Mr. Wooden.

In the same report, the Commission—and this is something that I do not quite understand—says:

Adoption of the preponderance rule would, inevitably and materially, increase the length of the record in the Commission's proceedings, unduly prolong the trial of cases, and increase the expense of litigation.

That statement hardly seems to be consonant with the presentation being made.

When I refer to the preponderance rule, I do not refer to quantitative evidence, but, rather, to the weight of evidence. And I presume the Commission, in writing that, had the same thing in mind.

Pardon me, Mr. Chairman, for making that statement, but I wanted to get my position set right in view of the statements which the witnesses have made.

MR. RABIN. May I ask you a question, Mr. Reece? You agree that the courts have written into the books, before the word "evidence," the word "substantial"; they have written that in by decisions; there is no question about that?

MR. REECE. That would seem to be the case, but is that the same as the substantial-evidence rule or the same as the preponderance rule?

MR. RABIN. It is not; otherwise we would not be here. It is not.

MR. REECE. That seems to be an important consideration.

MR. RABIN. That is the issue. I wanted to get into the record that the word "substantial" has been written into the law by decision.

MR. REECE. Yes.

MR. SADOWSKI. Are we all through on the question? If so, proceed, then.

MR. WOODEN. In connection with Congressman Reece's last statement, I would like to say that I have had the personal experience of knowing and seeing that records were lengthened, hearings lengthened for the purpose, as I see it, of aiming to get the circuit court of appeals to do what they do not now do under the substantial-evidence rule, namely, to have them weigh the evidence and pick and choose among conflicting inferences for that purpose. That leads directly into the lengthening of records and the lengthening of hearings, because they are aiming at the second trial de novo. That is the place that they are aiming to go.

MR. REECE. Well, now, the proposal of this bill does not indicate a trial de novo. That came up incidentally at the suggestion of someone else.

MR. WOODEN. But Dean Stason, the first witness in support of the bill, said that is exactly what this bill would do, provide a trial de

novo but only on the same record that was made before the Commission.

I would like to proceed.

Mr. SADOWSKY. You may proceed.

Mr. WOODEN. According to my prepared statement, if I may.

The statement of Mr. Kelley has shown what the substantial evidence rule is as applied by the courts in reviewing the Commission's findings of fact and how it has worked in actual practice. We have seen that it does not, as its critics assert, permit the Commission to make and maintain findings of fact such as reasonable men could not justify on a preponderance of the record evidence. Unless so supportable the Commission's findings can be set aside now under the substantial evidence rule. Accordingly the chief reasons advanced by such critics are without substance. From this it follows that the proponents of the preponderance rule for appellate purposes have failed in their efforts to show any defects in the substantial evidence rule which call for its abandonment.

The purpose of this statement, however, is not to further defend the substantial evidence rule. No further defense seems necessary. It is the purpose here to show affirmatively the defects of the preponderance rule as a standard for review by the appellate courts. This necessarily involves an understanding and a reappraisal of the reasons why Congress has hitherto declined to establish the preponderance rule for appellate purposes. Those reasons run deep in the realm of fundamental public policy, as embodied in the substantive provisions of the Federal Trade Commission and Clayton Acts.

By contrast with the statement of Mr. Hoge that under the substantial evidence rule there is "no practical review" and of Mr. Thompson that it is an "admitted mockery," the sixth circuit court of appeals has said that—

the rule of substantial evidence is one of fundamental importance and is the dividing line between law and arbitrary power (*N. L. R. B. v. Thompson Products, Inc.*, 97 F. (2d) 13, 15 (1938)).

Mr. Digges says that he sees—

no reason, no justifiable reason, why the rule of proof which the Commissioners say they enforce anyway should not be written into the statute if that in fact is the rule of proof which they enforce (typewritten transcript, p. 44).

That statement simply assumes that the rule of proof should be the same for appellate as for trial purposes and therefore begs the question that is here involved. It will be the thesis of this statement to show that there should be, as now, a different rule for appellate than for trial purposes and that while the preponderance rule is implicit in all trial forms, it is not appropriate to the appellate functions of a reviewing court.

What does the term "preponderance" mean? "Preponderance of the evidence" as defined by the courts, is not a legal term (*Maryland Casualty Co. v. Borerie* (Tex.) 37 S. W. 2d 310, 312). The word "preponderance" has the same meaning when applied to evidence as applied in ordinary conversation and is defined as to outweigh, to exceed or surpass in weight, force, influence, number, and so forth, to overbalance (*City of Cushing v. Bay*, 198 Pac. 877). The court in *San*

Antonio Traction Co. v. Higdon, (Tex.) 123 S. W. 732), citing and quoting Wigmore on Evidence, said:

Proof by preponderance of evidence is that state of mind in which there is felt to be a preponderance of evidence in favor of the demandant's proposition, though the application of the phrase "preponderance of evidence" is apt to lead the judicial discussion close to the danger line of the fallacious, quantitative or numerical theory of testimony.

Why then substitute for the definite and certain substantial evidence rule a word so indefinite in meaning and uncertain in effect? Because of its close relation to the fallacious, quantitative, and numerical theory of evidence, adoption of the preponderance rule would inevitably and materially increase the length of the record of proceedings, unduly prolong the trial of cases, and increase the expense of litigation. It would increase the work of the already overburdened courts and to the extent it is effective it would require appellate courts to determine the credibility of witnesses, weigh the evidence and completely absorb the fact-finding functions of the Commission.

Those who are not satisfied with the substantial evidence rule as applied by the courts in reviewing orders of the Federal Trade Commission obviously want something more than a review based upon the standard of what capable and reasonable men might have reasonably decided. What that something is was stated by Dean Stason to the committee on the opening day of the hearings. He said that the preponderance of evidence provision in the bill—

would, in effect, make the court proceeding a trial de novo on the same record as that prepared by the Commission, instead of being a trial de novo in the sense that new testimony is taken. It would be a trial de novo, excepting that the record would be prepared by the Commission (typewritten transcript, p. 18).

Dean Stason also informed the committee as follows:

Now, if we do adopt the principle of the trial de novo, then by so doing, you bring about several collateral results which may not be so good. In the first place, you burden the courts with a very considerable mass of litigation that the courts would find difficult to dispose of. And, in the second place, you would be taking the authority and responsibility away from the commissions, making it unlikely that they would be developed in an authoritative and responsible way. In the third place, you would by adopting the trial de novo technique put to one side whatever benefits might be obtained by the very large technical staff and equipment of the agency (ibid, p. 33).

The conclusion is automatic that proponents of the preponderance of evidence rule really want two trials based on preponderance, one which the Commission must give them unless the Commissioners are false to their oaths and elemental obligations and another in the court of appeals. By the same token why should they not be allowed to go into another circuit court after losing out in one? The two circuits could as easily disagree on what is the preponderance of the evidence as one court could disagree with the Commission.

In his 1941 testimony on the administrative law bills then pending, Dean Stason described an early construction of the substantial evidence rule which made it the practical equivalent of the preponderance rule. He said:

* * * the term "substantial evidence" is sometimes construed to require virtually a weighing of the testimony, a balancing of the persuasive effect of the evidence offered on the one side against that offered by the other. That technique

has in the past been followed in the review of Federal Trade Commission cases. Whenever this interpretation is adopted, no evidence is deemed substantial unless, upon examination of the whole record, a substantial conviction of the "rightness" of the decision exists in the mind of the reviewing court.

Dean Stason then condemned that substantial equivalent of the preponderance rule by saying:

Such a construction is quite as objectionable as is the other extreme. It makes the court the final arbiter on the issues of fact in all cases, and if it were generally adopted it would not only overload the courts but would withdraw from the administrative tribunals "appointed by law and informed by experience" the conclusiveness which common sense and good administration demand (hearings before a subcommittee of the Committee on the Judiciary, U. S. Senate, on S. 674, S. 675, and S. 918, May-July 1941, p. 1356).

Mr. REECE. If I may read another point of Dean Stason's testimony at that point, dealing with the same subject: he is speaking in the event of the enactment of the McCarran bill, the sentence beginning on line 12, reads as follows:

Upon such filing of the petition and transcript the court shall have jurisdiction of the proceedings and of the question determined therein, and shall have power to make and enter upon the pleadings evidence and proceedings set forth in such transcript, a decree affirming, modifying, or setting aside the order of the Commission, or modifying the remedial provisions of the order, if they are deemed by the court to be unreasonable and harsh or severe.

A good deal of that is not very much out of line, as I see it, with the suggestion which is proposed in the bill, because I think Judge Stason there is meaning substantial evidence in the general sense of preponderance.

Mr. WOODEN. The question of the remedy or the extent of the Commission's discretion in applying the remedy is a question which is not within the purview of my statement, and it raises a wholly different set of questions than the one of the preponderance of evidence rule versus the substantial evidence rule.

Mr. O'HARA. At that point, as I get the gist of the complaint in the matter of appeals from administrative bodies; that is, to which the complainants direct their criticism, it is that under the substantial evidence rule it has gotten to mean practically the scintilla of evidence rule, because the reviewing court has reached the point in recent years of its decisions of saying, "If there is any evidence," and that is to which some of these folks, as I understand it, object, that the court gets away from the persuasiveness of the substantial evidence or the preponderance of evidence, down to where is becomes a scintilla of evidence.

Mr. WOODEN. I think the trend has been the other way; that in the earlier years the courts were more inclined, as you say, and of course you can find as Dean Stason states, decisions spotted all the way up and down, from one extreme to the other. You can prove almost anything if you pick the right case, but the trend, I think, has been for the courts to require substantial evidence, such as would appeal to a reasonable mind, rather than the scintilla rule.

Mr. RABIN. To the extent that they have written it into the law.

Mr. WOODEN. Yes. The courts put that in themselves.

Mr. REECE. When the dean was speaking on that phase of the question, Mr. Wooden, and made the suggestion as to what should be done in the event that the McCarran bill should pass, I asked him this ques-

tion: "It would be your hope in that event that the language that you have suggested would accomplish the same purpose that the preponderance of evidence language, as now embodied in the bill, is intended to accomplish?" Dean Stason: "That is right. The change in the language, plus the change in the process"—which the dean suggested—"would accomplish the same objective."

Then he goes on: First, the word "evidence" conclusive of facts if supported by evidence is considerably modified and strengthened and clarified. It will be "substantial evidence" written into the measure, and not just by judicial interpretation drawn in. Moreover, it will be substantial evidence upon the whole record.

And that seems to me to be a rather important consideration.

A phrase which has come to mean in judicial parlance more than a scintilla rule, more than the examination of the evidence on just one side, but an examination of the whole record on both sides.

I hope you will not construe that language of the dean's as impugning the motives of the Commission, because I am sure he did not so intend it.

Mr. WOODEN. I have a different slant which I propose to present as I go along on that particular portion of the dean's testimony.

Mr. SADOWSKI. Proceed.

Mr. WOODEN. Apparently it is this technique and this objectionable construction which Dean Stason says—

has in the past been followed in the review of Federal Trade Commission cases—that this bill proposes to restore. He was probably referring chiefly to the case of Federal Trade Commission versus Curtis Publishing Co., decided by the Supreme Court in 1923. In that case (260 U. S. 568 (1923)) the Supreme Court set aside an order of the Federal Trade Commission, stating that—

the court must also have power to examine the whole record and ascertain for itself the issues presented and whether there are material facts not reported by the Commission.

It further stated that—

if there be substantial evidence relating to such facts from which different conclusions reasonably may be drawn—

the court had full power to decide the controversy without remanding the case to the fact-finding body for additional findings. Chief Justice Taft and Justice Brandeis however expressed doubt about the soundness of such a declaration because—

it may bear the construction that the court has discretion to sum up the evidence pro and con on issues undecided by the Commission and make itself the fact-finding body.

They thought it "of high importance" that the court should "scrupulously comply with the evident intention of Congress" that the Commission—

he made the fact-finding body and that the Court should in its ruling preserve the Board's character as such and not interject its views of the facts where there is any conflict in the evidence.

The views then expressed by the minority (Chief Justice Taft and Justice Brandeis) have become the well-settled law under the *Algoma Lumber case* (291 U. S. 67). This bill would reverse that well-

settled law and restore what Dean Stason said was an equally objectionable extreme.

There is still an occasional tendency of appellate courts to apply a concept of the substantial-evidence rule that makes it the practical equivalent of the preponderance rule. This is what Dean Stason says is "quite as objectionable as is the other extreme." In the case of the Carlay Co. versus Federal Trade Commission, decided February 15, 1946, the Circuit Court of Appeals for the Seventh Circuit set aside the Commission's order on the ground that the findings were not supported by substantial evidence. It did not say that the findings did not meet the test of what reasonable men might have reasonably found. In reaching its decision the court really weighed the evidence, treated the proceeding as a trial de novo, and set the order aside because the Court obviously would have disagreed with the Commission's findings if the issues had been presented to it as an original proposition.

Mr. REECE. I have a copy of that decision before me, and I find this sentence in the Court's statement:

There is no evidence in this record to support a finding that is necessary to support—

and then certain statements; and it then goes on to say in another sentence—

substantial evidence is more than a mere scintilla.

Mr. WOODEN. It gave a perfect definition of the substantial-evidence rule but it did not follow that rule itself.

Mr. O'HARA. That was what I was impressed with.

Mr. REECE. It means such realm as a reasonable mind would accept as adequate to support a conclusion.

Mr. WOODEN. A very fine definition.

Mr. O'HARA. Might I say this at this time: Is it not true that quite generally in the courts, the reviewing courts, whether it is the adoption of the rule or a little laziness, it got to the point where, if there was an appeal from an administrative body, the first question that would come up would be "Is there any evidence?" The court would ask that, "Is there any evidence to support it?" Here is witness so-and-so who said so-and-so. All right, then, they would throw up their hands and say, "There is evidence to sustain the findings." That is the thing which, unfortunately, too often the courts have done, and I think it has resulted in the wave of complaints that have arisen over the so-called substantial-evidence rule.

Am I correct in that statement or not?

Mr. WOODEN. I would not doubt there could be some instances of that, but, as I see it, if you imposed upon that same court the preponderance rule, with a big record, it would promote rather than remove the evil that you are aiming at, because that particular court, faced with the duty of resolving the preponderance of the evidence and weighing the evidence, would be more likely, in my judgment, to fail to do what it is supposed to do.

Mr. O'HARA. You and I might differ on that.

Mr. WOODEN. Oh, yes.

Mr. O'HARA. That is one conclusion.

Mr. WOODEN. Proponents of the preponderance rule, however, can hardly say in the face of this decision that the courts consider them-

selves helpless to set aside an order under the substantial evidence rule.

Mr. REECE. There are some statements in that opinion to indicate to me that the court found no evidence, and therefore they were free to overrule the findings of the Commission.

Mr. WOODEN. I would like to say there is room for difference of opinion upon the correctness of such statements.

Mr. REECE. But, Mr. Wooden, sometimes the litigant, when you rule adversely against him in the Commission, might feel the same way.

Mr. WOODEN. That happens in every trial forum that you can imagine. The trial forum cannot satisfy both sides.

Mr. REECE. You have again put your finger on the button. It is recognized under our whole system of judicial procedure.

Mr. WOODEN. That if a litigant feels aggrieved he is entitled to an appeal under appropriate conditions.

Mr. WOODEN. Yes.

Mr. REECE. Therefore, we have provided an appeal for the man when he feels that way, to another tribunal, to have that question adjudicated; and that is the thing, in my opinion, that has given confidence in our courts. If a litigant feels that he is aggrieved by the decision of a court, he has a remedy. He may not exercise the right of appeal, but the fact that he has such a right gives him a feeling of confidence and assurance; because he knows that the court adjudicating his rights is doing so, knowing that if the litigant thinks he is aggrieved, he can appeal to a higher court.

And getting back to the statement that you quoted a while ago; that is the difference between law and arbitrary action, because if there is arbitrary action, he can appeal.

And if you will permit a statement, and now I am, in a way expatiating and not asking a question, if we provide the rights of adequate appeal, Mr. Wooden, not only as it relates to the Federal Trade Commission but any other agency, administrative agency of the Government, then there is no danger in bureaucracy, but when we fail to provide an adequate right of appeal, as the evidence you quoted indicates, there is danger of arbitrary power coming in and being exercised by the administrative agencies. I think that is really a very vital phase of this whole question, and one that cannot be written off too easily by the statement that in providing the right of an adequate appeal that we are impugning some tribunal's motives or charging direlection in the performance of duty.

And, really, when able lawyers, representing the Government, come before the committee and infer that when you make that proposal, which is the essence of our system of government, that we are impugning somebody's motives, it is disappointing to me; really, it is. And I hope that that question will not be further belabored.

Mr. WOODEN. It will not by me.

Mr. REECE. By those representing the Commission or any other agency of the Government.

Mr. WOODEN. Of course, Mr. Congressman, the whole question at issue is. How much is adequate in the form of judicial review? We all concede the general principles of adequate judicial review.

Mr. REECE. The courts must determine that question, if the litigant is going to be put in a position where he feels that he might not have a grievance.

Mr. WOODEN. Congress, in the first instance, has delineated and defined the scope of the review and thought it was adequate. Of course, Congress can always change its mind, as anyone else can, but this has been considered adequate for a good many years. And the adequacy of it depends in some substantial measure upon the kind of a problem you are dealing with and what you are seeking to accomplish.

I should like to go ahead. I will not further trouble the committee with any discussion of the implied impugning of the Commission's integrity.

Mr. Digges says that the substantial evidence rule, as he conceives it—

results in placing the findings of fact by the Commission in a category higher than findings of fact by a district court of the United States (typewritten transcript, p. 41).

Mr. Hoge likewise says that—

the immunity which this Commission enjoys is a greater immunity than the district courts of our land enjoy, when trying the same sort of cases.

He refers to the "helplessness" of the courts at the present time (*ibid.*, p. 121).

I should not think that the courts were very helpless in view of that Carlay decision just 2 weeks ago.

Mr. REECE. I wish you would please read the speech which Judge Martin made before the New York Bar and which Mr. Hoge happened to have available to quote from when I raised the question.

Mr. WOODEN. He was not talking about the Federal Trade Commission, I am sure of that, and we are talking about a bill dealing here only with the Federal Trade Commission.

Mr. REECE. He is talking about all of them.

Mr. WOODEN. I do not feel called upon to answer on behalf of all administrative agencies.

Mr. O'HARA. I appreciate that lawyers, when they get defeated, sometimes by a court, feel a little hurt for a couple of days, but they get over it.

Let me ask you in that connection as to these gentlemen who appeared here. I never saw them before, until they appeared here. Are they men of standing in their profession as lawyers and before the Commission?

Mr. WOODEN. I assume so. I do not know them all personally. I know some of them by reputation.

One thing that did impress me, they all represented proprietary interests such as proprietary drug companies.

Mr. O'HARA. Substantial business people?

Mr. WOODEN. People who are interested in advertising and selling goods by advertising, and they have come in conflict with some of the Commission's rulings against misleading advertising.

Mr. O'HARA. I presume that involved in their clients' cases were some very substantial questions also involving the existence of the client. Is that not true?

Mr. WOODEN. No doubt; very substantial.

Mr. REECE. What business could you name of importance that would not have some relationship to advertising?

Mr. O'HARA. That is what I was getting at.

Mr. REECE. And the mere fact that the witnesses who appeared before the committee represented clients who advertise, I do not think that ought to be put in such a way as to prejudice their standing and their testimony.

Mr. WOODEN. I do not offer it as such.

Mr. REECE. The Association of National Advertisers embraces a rather wide scope in the business field; and unless I misunderstand it, so does the Federation of Advertisers.

Mr. WOODEN. Quite largely.

Mr. REECE. Such companies as the Cream of Wheat, it may do some proprietary medicine business, but if so I am not aware of it, and Johnson & Johnson may do likewise; I do not know its whole scope of operations, but they should inspire confidence. The clients represented by the Chadbourne firm in New York, they may do likewise, but I did not have that impression. And, as I say, about the Federation of Advertisers, which, I believe, was represented by Mr. Murphy, he impressed me as being a man of parts and standing.

Mr. RABIN. I will certify to that.

Mr. REECE. And Mr. Digges impressed me that way. He is the son-in-law of Senator Glass, and I do not think the Senator has disowned him. Mr. Hoge is the type of man we in the South refer to as a gentleman and scholar.

I am not picking these out by way of excluding the others, but the others impressed me, too. They impressed me on the hearing of this bill which was conducted here, that they were being very objective.

Mr. WOODEN. I have no doubt that they were very objective.

Mr. REECE. Very objective.

Mr. O'HARA. My question might have had some inferences which were not intended, but the point that I was making, as I understood from some of these witnesses, they said that their clients, some of their cases involved not only oftentimes hundreds of thousands, but perhaps millions of dollars; it involved the very existence of the company, of themselves, in some of these orders.

So, what I was getting at was that the decisions which were made and which Mr. Kelley spoke of yesterday, were tremendous in importance and tremendous size of these records, and he impressed me with the fact that these orders are far reaching. And not only is the public interest involved but the conflict with the private interest is involved, as I fully appreciate, so that we appreciate the importance of the work of the Federal Trade Commission very much.

Mr. REECE. The only thing that is causing me any impatience is the discussion of the phase of the bill that I am greatly interested in, the conflict of jurisdiction with the Food and Drug Administration, has been held back for such a long time.

Mr. WOODEN. That will be reached in due course, not by me, however. I would like to go ahead.

Mr. Hoge then quotes rule 52 (a) of the rules of civil procedure in Federal courts to the effect that "findings of fact shall not be set aside unless clearly erroneous." He then states that this accords with modern equity practice in that the trial court's findings as to the facts "may be set aside when contrary to the clear weight of the evidence" (ibid., p.

122). Under rule 53 of the rules of civil procedure various issues may be referred to a master to take and report upon the evidence relating thereto. It is provided that—

in an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous.

So, if the trial court should rest its findings on those of the master the practical effect is that the appellate court cannot set even the master's findings aside unless they are clearly erroneous.

It will be noted that the wording of rule 52 (a) is in the form of a limitation upon the appellate courts against interfering with the trial court's findings unless they are "clearly erroneous." If those words are not the equivalent of what reasonable men may have reasonably found what do they mean? What other standard can there be of what is "clearly erroneous"? The proposed preponderance-of-evidence rule does not contain any limitation or standard such as contained in rule 52 (a). The review courts would therefore be invited and encouraged to set aside the Commission's findings of fact even though they are not so clearly erroneous that reasonable men could not have reasonably made them. So in order to correct a condition which is incorrectly said to involve giving the Commission's findings an appellate status superior to those of United States district courts it is proposed to give the Commission's findings an appellate status that is distinctly inferior to those of such courts. It is even proposed to give the Commission's findings a status that is distinctly inferior to the findings of a jury. Logically, of course, there is less reason to make conclusive on appellate courts findings by a jury of inexperienced laymen if supported by substantial evidence than to give a similar status to the findings of a highly trained and especially qualified administrative agency if likewise supported by substantial evidence.

In any event the proponents of the preponderance rule who complain because the findings of the Federal district judges have an appellate status which they say is inferior to those of the Commission might equally well complain because the factual findings of such judges have less immunity from appellate interference than those of a jury. The argument is enhanced by a consideration of the status of the trial court's findings of fact after a jury trial has been waived. Surely its findings after such waiver would have equal rank in the appellate court with those of the jury, in which case the fine line of distinction between the substantial-evidence rule and the clearly erroneous rule would fade out completely.

The modern trend as embodied in rule 52 (a) is to sustain the findings of fact of the trial court except where they involve an arbitrary and capricious treatment of the evidence not reasonably reflecting its preponderance.

A case decided by the Supreme Court of February 4, 1946, is instructive in this connection. A district court had decided that newly discovered evidence adduced in support of a motion for a new trial was insufficient. Upon appeal to the circuit court of appeals the decision of the district court was unanimously sustained, the circuit court holding that it could not substitute its judgment on the facts for that of the trial judge, that it did not have the power to try these facts *de novo*, and that the trial judge had not reached his conclusion arbitrarily, capriciously, or in the misapplication of any rule of law.

A new motion for a new trial was then filed in the district court based upon additional newly discovered evidence. That motion was also denied by the district court.

Upon a second appeal to the circuit court of appeals this second ruling of the district court was reversed by a divided opinion. On certiorari the Supreme Court reversed the circuit court of appeals, adopted in substance the minority or dissenting opinion of that court, and declared that the lower appellate court was right in the first place when it declined to try the facts *de novo*. The Supreme Court, in warning against the abuse of motions for a new trial because of newly discovered evidence, said that "one of the most effective methods of preventing this abuse is for appellate courts to refrain from reviewing findings of fact which have evidence to support them." As a result of the failure to so refrain in that case the defendants convicted of income-tax evasion by a jury in October 1940 successfully avoided punishment until February 1946 (*U. S. v. Johnson*, No. 115; and *U. S. v. Jack Sommers et al*, No. 116). The Supreme Court reached its conclusion despite the fact that the majority of the circuit court of appeals in its second opinion said that it had a "conviction" that was "without reservation" that the district court erred in its findings of fact, that it had abused its discretion in making such findings, and that the proof pointed "unerringly" to that conclusion (149 F. (2d) 31, 42, 43). In other words, the circuit court was following the preponderance rule and firmly believed the district court's judgment was clearly erroneous.

The rule applied by the dissenting judge in the second circuit court of appeals' decision and which was sustained by the Supreme Court was stated in the former's dissenting opinion as follows:

We determine only whether the trial court reached a decision it might reasonably have reached upon the facts before it; not whether we, on those facts, might have reached a different conclusion. If the trial court reached a conclusion which it might reasonably have reached, and excluded nothing from its consideration which it ought to have considered, it has not abused its discretion. That is the only question we have to determine. I think a fair review of the trial court's decision requires us to conclude that there was a basis in reason for its decision and that there was no abuse of its discretion (149 F. (2d) 45).

That, I submit, is the equivalent of the substantial-evidence rule as the courts have applied it in their review of Federal Trade Commission cases. The *Johnson* case was a criminal case. If the preponderance rule is not to be applied in the review of a factual ruling by the district court in a criminal case, why should it be applied to the cease-and-desist orders of the Federal Trade Commission? However, the Supreme Court, in this recent decision, was merely following what it had done in 1935 and 1936. In one case it refused to disturb the findings of a master and of a Federal district court because they were "supported by substantial evidence" (*Borden's Co. v. Ten Eyck*, 297 U. S. 251, 261).

Mr. O'HARA. In the appeal that you have spoken about to the Supreme Court on the conviction of the *Johnson Co.*, the question involved was as to whether the trial court had abused its discretion in refusing to grant a new trial. I think that is a little different category than the line of decisions which we are dealing with here affecting a substantial question of evidence supporting the decision of the court.

Mr. WOODEN. But it turned upon the trial court's judgment of the sufficiency of the facts to justify a new trial. And that factual ruling of the trial court is what the Supreme Court finally said should have been adhered to.

Mr. O'HARA. The reason I bring it up is that involving a question of newly discovered evidence is one in which the courts of the land have given greater weight to the opinion of the trial court than in almost any other review in denying a motion for a new trial on the ground of newly discovered evidence.

Mr. WOODEN. In the second appeal to the circuit court, the trial court was reversed nevertheless but by a divided court.

Mr. REECE. Under the rule in civil procedure, there has been adopted a rule which, in the trial of cases in Federal court by the judges without juries, which reads: "Findings of fact shall not be set aside unless clearly erroneous," and I believe you said, due regard should be given to the opportunity of the trial court to judge of the credibility of witnesses.

When the rule was adopted having in mind that the judge was in a position to observe the witness and judge his credibility but such is the case with the Federal Trade Commission.

And then in the case of the Guilford Construction Co., it was held:

A finding of fact is clearly erroneous if it is against the clearer weight of the evidence and it does not suffice that it be supported by evidence,

which would seem to be going in the direction pointed by the proposal before us.

Mr. WOODEN. I think that you can make a distinction, a theoretical distinction, between the clearly erroneous rule and the substantial-evidence rule, but it is, as I said, such that it fades out completely at times.

I can hardly make a clear distinction, a tenable distinction between the clearly erroneous rule and the substantial-evidence rule.

Mr. REECE. The rule on civil procedure adopted does clearly indicate that it is expected that the courts would weigh the evidence, and if they find that the findings are contrary to the clear weight of the evidence that they are reversed. And this decision interprets what is meant by the clearer weight of the evidence.

Mr. WOODEN. That is permissible, of course, under that rule, but the way the rule is framed, nevertheless, it shows that they look upon it with great disfavor, you might say, by the form in which the rule is couched. It shall not be set aside, it says, unless clearly erroneous; it does not say you may set it aside if you do not agree with the lower court.

Mr. REECE. And if I may interject, there is one other distinction, and this does not go to what you are saying, that the courts have the right to affirm, modify, or set aside a decision of a lower court, and they hardly have that full scope of action in the case of an appeal from the Federal Trade Commission. They are confronted more directly with the proposition of reversing it or affirming it, which creates a more difficult situation for the courts at times, as there are numerous cases cited by the proponents of the legislation where the court feels an injustice has been done but is helpless to modify the Commission's order to give relief.

Mr. WOODEN. That is with regard to the scope and nature of the remedy.

Mr. REECE. That is it.

Mr. WOODEN. Rather than the question of what the preponderance of the evidence is. That is a question that is before the Supreme Court now in the *Alpacuna* case.

Mr. REECE. In civil procedure when a case goes up on appeal the judge has a wider range of action in curing a defect than is the case in a proceeding of the Federal Trade Commission which is appealed.

Mr. WOODEN. I think that is true, but they are loath to exercise it, as I think I have shown.

Mr. O'HARA. The statute, for example, provides in reference to the Federal Trade Commission, the court shall have power to enter a decree affirming, modifying, or setting aside the order of the Commission.

The court does not actually always do that. The fact is that the Commission takes the view oftentimes that the court has no power to modify the terms of the decree which has been entered in the Federal Trade Commission.

The Court may say, "We disagree that there was not any evidence to sustain it," but it does not actually say what the Commission shall do in rewriting the order upon reversal.

Is that not true?

Mr. WOODEN. They have not disagreed with the Commission as to the existence of substantial evidence. They were willing to accept the fact that there was substantial evidence, but they did disagree as to the extent of the order, the extent of the remedy.

The courts adopted that principle first in the case of other agencies. We, naturally, have fallen heir to some of the results.

Mr. REECE. The reference made to the judge being in a position to determine the credibility of witnesses, in hearing the trial, in the first instance, brings up the question that was referred to yesterday, I believe, when Judge Kelley was before the committee, that in some of these cases before the Federal Trade Commission, the record becomes very voluminous.

In one case, the record, I think, is 50,000 pages and in the Carter case, some 15,000 pages, and numerous other cases ranging up toward that figure. And I believe either you or Judge Kelley referred to one case which was very large.

Mr. REECE. Which was more voluminous, 50,000 pages. Does the Commission have the time to study the whole record in those voluminous cases? And if not, who does study and assemble the facts from such voluminous records for the Commission?

Mr. WOODEN. In the first place, the trial examiner who sits and hears the witnesses prepares a report which is submitted to opposing counsel, and then there is a filing of briefs by opposing counsel, and finally oral argument before the Commission, and only after all of that has been completed, does the Commission proceed to reach its conclusion.

Mr. REECE. That is rather interesting. It is a phase of the procedure which I had not been impressed with before.

Under that procedure, the Federal Trade Commission itself almost sits as an appellate agency, does it not? That is, it does not hear

the witnesses and it does not read the record. It sits as a body, acts upon the briefs filed by the examiner and the argument by counsel.

Mr. WOODEN. In the past, the examiner's report was advisory to the Commission and the Commission may accept it or disregard it.

Mr. REECE. Of course. On the question of procedure;

What is the relationship of the examiner, I mean, what relationship does he stand in? He is on employ of and named by the Commission. Who has brought the proceedings?

Mr. WOODEN. The Federal Trade Commission issued the complaint, according to the requirement of the statute when it had reason to believe that the law was being violated.

Mr. REECE. When the court names a Commissioner to hear a case to which you referred, he is sitting for the court. He has had nothing to do with instituting the proceeding; therefore, he is unprejudiced, so far as between the Government and the defendant, that is, as is the judge.

Does the examiner and any who stand in the intermediate position between the examiner and the Federal Trade Commission and on up to the Commission, occupy that same relationship to the defendant that the court occupies of completely an impartial body, so far as bringing and prosecuting the proceeding is concerned?

Mr. WOODEN. Well, that goes into the philosophy of the statute under which the Federal Trade Commission was set up, and by reason of which it was given these commingled functions and made its duty under the statute to proceed on behalf of the public.

If you want to say that possibly an agency so constituted may not act in the public interest as a court does, why, the quarrel is with the philosophy underlying the statute. That is all there is to it.

Mr. REECE. Speaking for myself alone, I certainly do not have that view about it, that is, about that agency or other agencies of the Government, for that matter. I only assume that they are acting in the interest of the public.

Mr. WOODEN. It is somewhat analogous to the practice of courts that sometimes issue an order to show cause.

Mr. REECE. You are a reasonable man: if you were engaged in business, and being in business you are still a reasonable man, I presume you would be, and the Federal Trade Commission should feel that you had transgressed the law and its regulations and would institute a proceeding against you, and then the appropriate agencies of the Commission should, after formulating the complaint, cite you for hearing and trial, would you feel that it stood exactly, or that you stood in the same unprejudiced position before it, that you would if the complaint had been instituted by some other civil authority and you were cited before a court to have a trial and adjudicate the differences of opinion? Of course, there would be differences of opinion, otherwise you would not be engaging in the practice.

Mr. WOODEN. It seems to me that the situation is quite analogous to what happens when a court issues an order to show cause, sometimes in even a contempt proceeding where the court is involved, you might say, as a party.

In other words, its status is involved. One can make those theoretical criticisms, but it is a practical situation that we are confronted

with. Congress, evidently, thought that in creating these agencies to meet the situation and the problems involved, they had to combine these functions in one agency.

MR. REECE. I am not satisfied that Congress was wrong in doing so, but now the question involved here is, having done that, as our economic system grows more and more complex and the regulations become more far reaching, should we, under those circumstances, provide a more adequate right of appeal?

With a view of making sure that we continue to operate under law and not arbitrary action.

MR. WOODEN. In my judgment, that would tend to cripple the agency that Congress thought ought to have these commingled functions because it would tend to transfer—

MR. REECE. So far as I am concerned, I am primarily concerned in providing an adequate appeal and not to do so would cripple the commission.

MR. WOODEN. I think that will appear more fully as I go along in my statement that I have prepared.

MR. SADOWSKI. That is what I would like for you to do is to go along with that statement.

MR. WOODEN. In the other Supreme Court case I was referring to the findings of a Federal district court were accepted because "they have substantial support in the record" (*A. & P. Tea Co. v. Grosjean*, 301 U. S. 412, 420).

The long delay in the Johnson case suggests another objection to substituting the preponderance rule for appellate purposes in our cases. Knowledge that the appellate court is free to substitute its judgment on the facts for the Commission's findings will encourage respondents to make long records, to insist on cumulative evidence and to offer evidence of slight relevancy and materiality. There would be always the hope that the reviewing court can be impressed by the sheer volume of respondents' evidence, the number and importance of their witnesses, and the plausibility of their interpretations of or inferences from the facts. The Commission has numerous cases where the very size of the record would impose upon the appellate court an enormous burden which properly belongs to the trial body, unless the distinction between the functions of trial and appellate tribunals is to be no longer observed.

In *Zell versus American Seating Co.*, Judge Frank of the Circuit Court of Appeals for the Second Circuit said:

Perhaps nine-tenths of legal uncertainty is caused by uncertainty as to what courts will find, on conflicting evidence, to be the facts of cases (138 F. (2d) 641, 647, 648 (1943)).

If that statement be applied to the proposal to substitute the preponderance rule for appellate purposes it puts the proposal in the category of one which is certain to increase legal uncertainty by providing a trial *de novo* on the record made before the Commission.

One reason which would warrant the withholding—I have touched on this already but I want to amplify it—of a favorable report on this provision of the present bill is that the McCarran-Sumners bill which has been reported favorably to the Senate and is now pending as S. 7

undertakes to deal with the subject for all administrative agencies. Dean Stason stated to this committee as follows:

Now, I say if the McCarran-Sumners bill becomes law—and it is a bill that has been given the most careful consideration for many years—it will effectually improve the administrative process, and assuming that it applies to the Federal Trade Commission, I would say that the preponderance of evidence rule would no longer be necessary (typewritten transcript, p. 21).

He thereupon suggested that if the McCarran-Sumners bill were passed the preponderance rule now in the present bill be amended to read as follows:

The findings, inferences and conclusions of the Commission as to the facts shall be conclusive if, and only if, they are found to be supported by substantial evidence upon consideration of the whole record, or such portions thereof as may be cited by the parties (typewritten transcript, p. 22).

While the proposed amendment is couched in terms of the substantial evidence rule, Dean Stason nevertheless agreed with Congressman Reece that it “would accomplish the same purpose that the preponderance of evidence language as now embodied in the bill is intended to accomplish” (ibid. pp. 22, 23). If that is correct it would seem to follow that S. 7 with its quite similar language regarding substantial evidence based upon a consideration of the whole record is open to objections similar to what might be made to any direct proposal to substitute the preponderance rule. It corresponds to one of the various constructions of the substantial evidence rule which Dean Stason in his 1941 testimony on administrative procedure said was “quite as objectionable as is the other extreme” because it would make the court the final arbiter on factual issues, would overload the courts, and would destroy the conclusiveness of administering findings “which common sense and good administration demand” (hearings before a subcommittee of the Committee on the Judiciary on Administrative Procedure, May-July 1941, p. 1356).

It is interesting and relevant in this connection to observe that there was much difference of opinion among competent lawyers as to what effect similar language in the bills pending in 1941 would have on the substantial evidence rule. Acting Attorney General Biddle, referring to the contention that such language was only a statement of the present substantial evidence rule, said:

I do not know whether it means that or not. Why were the words “on the whole record” put in unless it means that the scope of the review of the facts is not pointed out? I think a court, inimical to the administrative activity of any particular agency, would take that “unsupported by substantial evidence on the whole record” and would decide there was enough evidence to give the right to review the case. I just have that doubt in my own mind (ibid., p. 1438).

In a supplementary written statement, Mr. Biddle said concerning the words “upon the whole record:”

Its effect is ambiguous; those who have supported it before this Senate committee have not been able to identify its meaning or extent, other than to say that it broadens the substantial evidence rule. How much it broadens the rule they have been unable to say. It may be an open invitation to courts to substitute their judgment for that of the administrative agencies; in any event, it is a cause fertile of unending litigation (ibid. p. 1496).

With regard to the substantial evidence rule and the words “upon the whole record,” Attorney General Biddle also pointed out that Mr. A. T. Vanderbilt, one of the authors of a bill containing such a provision and a member of the minority of the Attorney General’s

Committee on Administrative Procedure, had stated to the house of delegates of the American Bar Association that there was agreement that such language "was an advantage over the mere substantial evidence rule" (hearings on Administrative Procedure, pt. 3, p. 1495).

Dean Stason would now appear to have confirmed the views of those who then feared the possibility of weakening or frustrating the substantial evidence rule while seeming to incorporate it in a statute.

However these conflicting concepts and opinions may be resolved it would be more logical to have them resolved in connection with S. 7 which has been favorably reported to the Senate than in connection with the present bill which has just reached the stage of hearings before this subcommittee.

In his authoritative work, "Administrative Justice and the Supremacy of Law in the United States," John Dickinson, former Assistant Attorney General of the United States (1935-37), and at present, I believe, solicitor general for the Pennsylvania Railway Co., argues against the courts substituting their judgment for that of the administrative body on all conclusions to be drawn from the evidence, even though it bears on constitutional questions. He states:

There are two good reasons against it. It destroys the effectiveness of administrative regulation by reducing the administrative body to a practical nullity with a barren power of initial recommendation; and it yields no gain in security for the rights of property. Indeed, there is an actual loss in security, because greater confusion and not greater certainty is bound to be the outcome of the practice (p. 201).

Mr. Dickinson also says:

No court should make a decision without understanding whether it is applying a legal principle or merely differing from the fact-finding body as to an inference peculiar to the case. Without such understanding, the one will inevitably invade the province of the other; and the process of administrative application of standards should not be interfered with except for the conscious purpose of developing or enforcing precepts of law (p. 331).

I submit that to substitute the preponderance rule for appellate purposes would not be for the "conscious purpose of developing or enforcing precepts of law" but would inevitably promote judicial invasion of the administrative fact-finding process by providing a trial de novo on the original record.

In an article on administrative tribunals published in the Michigan Law Review of February 1938, Dean Stason said that because of the responsibility of such tribunals to the legislative and executive branches and because of judicial review, "tyranny resulting from 'irresponsibility' seems beyond the range of possibility" (vol. 36, pp. 556, 557).

He also said:

If the determining power of an administrative tribunal is reduced to zero by virtue of subjecting its decisions to full judicial review upon both the law and the facts, and if, pending judicial review, the status quo is preserved, the administrative tribunal is as completely shorn of judicial power as though it were reduced to the status of prosecuting officer. Under such circumstances it becomes in effect a referee, preparing records for the court to use in actually deciding the cases.

Dean Stason further stated that the administrative tribunal is designed to accomplish a specific task of regulation and—

Its principal reason for being is that the Congress or the State legislature, as the case may be, has concluded that a certain area of business, industrial, economic, or social activity demands regulation, and, being unable to regulate by self-executing legislation, an administrative tribunal is created for the purpose.

The principal task of the tribunal is to regulate. To aid it in its task it is implemented with a variety of powers. Some of these powers happen to look somewhat like, and may be classified as, judicial in nature. Others may be classified as legislative in nature. Still others may be administrative. However, all of their powers are simply incidental to the principal objective, regulation. Any reorganization which cuts away the tools provided to serve the regulatory process necessarily will reduce the effectiveness with which that process is carried on.

The necessary effect of a trial de novo on the record made before the Commission would be just what the Supreme Court said long ago in *U. S. v. L. & N. R. R. Co.* (235 U. S. 314, 321) would be the effect if it were to sustain the view of the Commerce Court that it had the power to set aside a finding of the Interstate Commerce Commission. It said that under such a power the Commission "would become but a mere instrument for the purpose of taking testimony to be submitted to the courts for their ultimate action." Since Dean Stason has stated here that the preponderance rule for appellate purposes will operate to produce a trial de novo on the testimony taken before the Commission, it follows that under it the Federal Trade Commission would become "a mere instrument for the purpose of taking testimony to be submitted to the courts for their ultimate action."

That then is the ultimate issue, whether Congress wants to reduce the power and functions of this Commission to that extent, just as in earlier years the railroads wanted the power and functions of the Interstate Commerce Commission reduced. The issue is whether what the Supreme Court referred to in the *L. & N.* case as "the progressive evolution of the legislative purpose" is here to be replaced by a regressive involution of the legislative purpose that Congress expressed in the original act of 1914 and reaffirmed in the Wheeler-Lea amendment of 1938. Do we want to put this Commission in the same helpless position that the Interstate Commerce Commission occupied in its earlier years because the courts sought to determine what was the preponderance of the evidence?

The majority of the Attorney General's Committee on Administrative Procedure in its 1941 final report, discussing the proposal to give appellate courts the power to weight and determine the preponderance of evidence, made this observation:

If the change would require the courts to determine independently which way the evidence preponderates, administrative tribunals would be turned into little more than media for transmission of the evidence to the courts. It would destroy the values of adjudication of fact by experts or specialists in the field involved. It would divide the responsibility for administrative adjudications (final report, p. 91).

The proposal to substitute the preponderance rule for appellate purposes is in effect a proposal to emasculate the administrative process by removing from it its vital and distinctive function as trier and finder of the facts. Unless it were for reasons that should have inhibited Congress from conferring such function upon the agency in the first place, there is no more reason to remove that function and transfer it to the appellate courts than to remove and transfer it from a trial court.

The Supreme Court in *Mississippi Valley Barge Company v. United States* stated:

The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body (202 U. S. 282 (1934)).

It follows that to impose upon appellate courts the burden of trying our cases de novo would impose upon them something more than ascertaining whether there is a "rational basis" for the conclusions of the Commission, would make the courts the administrators, and would exhaust the judicial function in more senses than one.

The result would be at odds with the principles stated by the Supreme Court in *Federal Communications Commission v. Pottsville Broadcasting Company*, when it said:

The technical rules derived from the interrelationship of judicial tribunals forming a hierarchical system are taken out of their environment when mechanically applied to determine the extent to which congressional power, exercised through a delegated agency, can be controlled within the limited scope of "judicial power" conferred by Congress under the Constitution.

* * * * *

To be sure, the laws under which these agencies operate prescribe the fundamentals of fair play. They require that interested parties be afforded an opportunity for hearing and that judgment must express a reasoned conclusion. But to assimilate the relation of these administrative bodies and the courts to the relationship between lower and upper courts is to disregard the origin and purposes of the movement for administrative regulation and at the same time to disregard the traditional scope, however far-reaching, of the judicial process. Unless these vital differentiations between the functions of judicial and administrative tribunals are observed, the courts will stray outside their province and read the laws of Congress through the distorting lenses of inapplicable legal doctrine (309 U. S. 134, 141, 143-144).

The issue that we are dealing with here is not merely procedural. It is fundamental. There is real danger that in the form of a procedural change the very considerations that brought this Commission into being may be sacrificed or lost in the resulting confusion. We assume that Congress desires and intends to adhere to the policy embodied in the Federal Trade Commission Act, as amended by the Wheeler-Lea Act, the Clayton Act, as amended by the Robinson-Patman Act, and the antitrust laws generally.

We submit finally that to inject the preponderance of evidence rule into the appellate consideration of cases arising under those laws would give such cases a specially favored appellate status that could only weaken the enforcement of such laws.

Mr. O'HARA. Mr. Wooden, you do not advance the philosophy that there should be no appeal from the ruling or decision of the administrative body, do you?

Mr. WOODEN. No, sir. We have that now. I think what we have now is adequate so far as the Federal Trade Commission is concerned.

Mr. O'HARA. Of course, the statute, when it was enacted originally in 1914, provided for appeals to the courts, as did the Wheeler-Lea bill.

Mr. WOODEN. Yes, sir.

Mr. O'HARA. And, of course, the reason I ask you that question, there are some people who feel that our laws should be administered by groups of administrative bodies rather than courts; there should be no review. I do not subscribe to that.

Mr. WOODEN. Nor do I.

Mr. O'HARA. As a matter of fact, no one knows what is going to happen to the McCarran bill, S. 7. I think my colleague, Mr. Rabin, asked that question of Dean Stason when he appeared before the committee. Mr. Rabin asked him if that bill did not pass, what his

objections were, if any, to this bill. And he thought that this bill was a good bill, so far as the direction of appeal, if S. 7 did not pass. And I think Mr. Rabin will remember that. I am just quoting the substance of his testimony.

The mere changing of a rule from substantial evidence rule to the preponderance of evidence rule would not, in any way, abolish the functions of the Commission in any way, would it?

Mr. WOODEN. In my own opinion, and in the opinion of some very substantial men whom I have quoted, including Dean Stason, it would cripple the Commission.

Mr. O'HARA. How would it cripple it?

Mr. WOODEN. By making the Commission, as Dean Stason says, "a mere media for transmitting the evidence to the courts for the courts' decision."

Mr. O'HARA. I do not agree necessarily with the dean on that statement. I think that he went a little bit far afield on that question because, as I view it, Mr. Wooden, you still have the right of appeal from the decision, limited as it may be to the substantial evidence rule, as the courts have written it in, but I find, and I think you will agree with me on this statement, that in the confusion which does exist in the decisions of the courts themselves, that it might be a helpful thing to have a yardstick as the preponderance of evidence rule.

Mr. WOODEN. Whatever confusion has existed in the past would not be a marker to what would exist under the preponderance of evidence rule.

Mr. O'HARA. In what way do you think it would be increased?

Mr. WOODEN. In the way that these various people have said, including Dean Stason, the Attorney General, the majority of the Attorney General's committee, and others, John Dickinson, others of that type. I do not know whether I can improve on what they have said. I doubt it very much.

Mr. O'HARA. You read one decision this morning by the Supreme Court which gave the preponderance of evidence rule, and you read another one which gives the substantial evidence rule.

That is what I was hinting at.

Mr. WOODEN. As a matter of fact, some of the concepts of these various rules shade off into each other, and it is difficult to know sometimes whether you are talking about one or the other.

As Dean Stason says, there are certain concepts of the substantial evidence rule that amount to the preponderance rule. That is what the courts formerly applied in Federal Trade cases, but they have gotten away from it.

Mr. O'HARA. Earlier in your statement you made some reference to the fact that you felt that Congress had refused to adopt the preponderance rule. Do you have anything in mind with reference to an absolute refusal on the part of Congress, or whether this question has ever been up?

Mr. WOODEN. Well, I have in mind the discussion in conference on the Wheeler-Lea amendment, where Congressman Lea said that the substantial evidence rule provided for an honest-to-God judicial review, that this was taken officially as being the conference committee's position, and that they reenacted the substantial evidence rule by their discussion.

Mr. O'HARA. That might have been the views of the conference committee but not necessarily the views of the Congress.

Mr. WOODEN. Oh, yes.

Mr. O'HARA. That is all I have.

(The following was submitted for the record:)

BRIEF IN SUPPORT OF THE BILL

(By Newell W. Ellison and Ernest W. Jennes)

INTRODUCTION

Section 5 (c) of the Federal Trade Commission Act (15 U. S. C. 45 (c)) provides that any order issued by the Federal Trade Commission to cease and desist from any method of competition it has found unfair or any act or practice it has found unfair or deceptive may be reviewed by the appropriate circuit court of appeals of the United States upon petition of the party to whom the order is addressed. Upon such petition the Commission is required to file in the court "a transcript of the entire record in the proceeding, including all the evidence taken and the report and order of the Commission." The court is empowered "to make and enter upon the pleadings, evidence, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission * * *." The scope of the court's review is circumscribed by the provision that "the findings of the Commission as to the facts, if supported by evidence, shall be conclusive."

Section 1 of H. R. 2390, introduced by Mr. Reece, of Tennessee, proposes to amend the foregoing provision by expressly authorizing the court in its decree to modify the order of the Commission "*as in its judgment the circumstances of the case require.*"¹

It would also amend section 5 (c) so as to require the findings of the Commission to be "supported by the *preponderance of the evidence*" in order to merit the status of conclusiveness.¹

This brief is submitted in support of these provisions which are intended to increase the scope of judicial review of findings of fact and orders of the Commission. Our support of these provisions can in no way be construed as a criticism of the integrity or fidelity with which the Commission performs the duties placed upon it by the act creating the Commission. The Commission is composed of men of the highest integrity but they, like all men, make errors in judgment and our support of an adequate review of their findings and orders is to do no more than endeavor to correct errors that inevitably befall the acts of men. As will be seen, the need for more adequate review is perhaps due not so much to the historical inadequacy of the substantial evidence rule as it is to the dilution of that rule in its application by the appellate courts. Whatever the reason, the fact remains that litigants feel that review of the Commission's findings by the courts is inadequate and that an enlargement of the scope of the review is necessary to correct the situation.

EXISTING SCOPE OF REVIEW

Review of the findings of fact of the Federal Trade Commission is now governed by what is known as the substantial evidence rule (Cf. *Consolidated Edison Co. v. National Labor Relations Board*, 305 U. S. 197, 229 (1938)). This rule has been construed so as to confine judicial review of the actions of administrative agencies within very narrow limits. In *Neff v. Federal Trade Commission* (117 F. (2d) 495 (C. C. A. 4th 1941)) the court said at page 497:

"It is settled beyond controversy that under such a statute, this court may not pass upon the weight to be given to conflicting testimony. If the findings of the Commission are supported by substantial evidence, they are binding upon us."

An indication of how this rule of review has limited judicial discretion is to be found in *Federal Trade Commission v. Standard Education Society* (86 F. (2d) 692 (C. C. A. 2nd 1936), reversed 302 U. S. 112 (1937)). Here, the Circuit Court of Appeals for the Second Circuit was totally unimpressed by certain findings of the Commission:

"Coming now to the practices forbidden, the first and third clauses of the order were in substance the same; they forbade representing that the 10 books were given away and that only the 'extension service' was sold. It is true that the

¹ Italic supplied.

Commission is not to sanction unfair trade practices merely because they are of long standing; its duty is to bring trade into harmony with fair dealing (*Federal Trade Comm. v. Winsted Hosiery Co.*, 258 U. S. 483, 493, 494; 42 S. Ct. 384, 385, 386; 66 L. Ed. 729). To the discharge of that duty it should not, however, bring a pedantic scrupulosity; too solicitous a censorship is worse than any evils it may correct, and a community which sells for profit must not be ridden on so short a rein that it can only move at a walk. We cannot take seriously the suggestion that a man who is buying a set of books and a 10 years' 'extension service' will be fatuous enough to be misled by the mere statement that the first are given away and that he is paying only for the second. Nor can we conceive how he could be damaged were he to suppose that that was true. Such trivial niceties are too impalpable for practical affairs, they are will-o'-the-wisps, which divert attention from substantial evils" (pp. 695-696).

Other findings were, the court felt, wholly without proof:

"For the eighth [clause] which forbade the use of such testimonials which had not been given by the person whose name was used, we have been able to find no support in the evidence; and we are referred to none except the conclusions of one, Nixon, which are outweighed by her identification of the handwriting of the person whose name was used" (p. 697).

The Supreme Court, however, unanimously reversed the court of appeals, holding that it had no "right to ignore the plain mandate of the statute which makes the findings of the Commission conclusive as to the facts if supported by testimony" (*Federal Trade Commission v. Standard Education Society*, 302 U. S. 112, 117 (1937)).

In *Jacob Siegel Co. v. Federal Trade Commission* (150 F. (2d) 751, 755 (C. C. A. 3d 1944, aff'd on rehearing 1945)) the court quoted as applicable to a Federal Trade Commission case the following language from *Medo Photo Supply Corporation v. National Labor Relations Board* (321 U. S. 678, 681-682 (1944)):

"It has now long been settled that findings of the Board, *as with those of other administrative agencies*, are conclusive upon review in courts when supported by evidence, that the weighing of conflicting evidence is for the Board and not for the courts, that the inferences from the evidence are to be drawn by the Board and not by the courts, save only as questions of law are raised, and that upon such questions of law the experienced judgment of the Board is entitled to great weight."

Under the substantial-evidence rule as enunciated in *Federal Trade Commission v. Standard Education Society*, *supra*, and as stated even more strongly in other cases, the appellate court is prevented from setting aside or modifying the findings of the Commission not only if it feels that a different conclusion would be reasonable but even if it feels that the conclusion of the Commission is clearly erroneous, and, upon a consideration of all the evidence, it would reach a different conclusion (*Swayne & Hoyt, Ltd., v. United States*, 300 U. S. 297, 304 (1937); *Manufacturers Railway Company v. United States and Interstate Commerce Commission*, 246 U. S. 457, 482 (1918); *Moretrench Corporation v. Federal Trade Commission*, 127 F. (2d) 792, 794-795 (C. C. A. (2d) 1942)). See *Segal v. Federal Trade Commission* (142 F. (2d) 255 (1944)), where the Circuit Court of Appeals for the Second Circuit said that even if the Commission wished to rely on testimony that was biased, it could not interfere whatever might be its own indisposition to rely on such testimony.¹ An extreme statement is to be found in *Consolidated Edison Co. v. National Labor Relations Board* (305 U. S. 197 (1938)), where the court of appeals sustained the Board's finding of discrimination because the record was not "wholly barren of evidence" to support it and the Supreme Court held that the substantial-evidence rule had been satisfied.

SCOPE OF REVIEW OF COURTS

It is pertinent to inquire into the scope of review to which the findings of a trial court are subject. In this connection, rule 52 (a) of the Federal Rules of Civil Procedure (28 U. S. C. 723 (e)) provides:

"In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunc-

¹ Cf. the strong language of the Supreme Court in *National Labor Relations Board v. Waterman Steamship Corp.* (309 U. S. 206, 226 (1940)), that "whether the court would reach the same conclusion as the Board from the conflicting evidence is immaterial and the court's disagreement with the Board could not warrant the disregard of the statutory division of authority set up by Congress."

tions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. *Findings of fact shall not be set aside unless clearly erroneous*, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.”¹

This—the clearly erroneous rule—was derived from the prior equity practice with respect to appellate review of the findings of fact of a trial court. Such findings were presumptively correct but would be set aside if clearly against the weight of the evidence (*Actna Life Ins. Co. v. Kepler*, 116 F. (2d) 1, 4-5 (C. C. A. 8th 1941) : 3 Moore’s Federal Practice 3115 et seq. Note to Rule 52 (a) 28 U. S. C. A. 723 (c)). According to the Honorable William P. Mitchell, chief of the advisory committee on the drafting of the rules, the findings of a trial court where a jury is waived or there is no right to a jury—whether in law or in equity—“can be set aside if against the clear weight of evidence, even though there is some evidence that might support a verdict or findings in a law case under the old system.” Rules of Civil Procedure, Annotated, Appendix, p. 199.

The Supreme Court has recently had opportunity to analyze the scope of review permitted under the clearly erroneous rule in *District of Columbia v. Puce* (320 U. S. 698, 701-703 (1944)).

“This statute was enacted in May 1938. The law at that time as to the review of findings of fact in equity was, as stated by Mr. Justice Brandeis for the Court, ‘in equity, matters of fact as well as of law are reviewable * * *.’ *Virginian Ry. Co. v. United States* (272 U. S. 658, 675). Findings of fact by the trial judge of course were presumptively correct and were accepted by reviewing courts unless clearly wrong. *Butte & Superior Copper Co. v. Clark-Montana Realty Co.* (249 U. S. 12, 30). This rule, however, did not deny power to the circuit court of appeals to review facts, but rather went to the weight to be accorded to the findings of a lower court and had special pertinence where credibility of witnesses was involved. This Court had a well-settled rule that ‘when two courts have reached the same conclusion on a question of fact, their finding will not be disturbed unless it is clear that their conclusion was erroneous.’ *Baker v. Schofield* (243 U. S. 114, 118). Such a rule would have no support in reason if the second court could not make its findings as a result of its own judgment.”

* * * * *

“We conclude, therefore, that the court of appeals has power to review decisions of the Board of Tax Appeals as under the equity practice in which the whole case, both facts and law, is open for consideration in the appellate court, subject to the long-standing rule that findings of fact are treated as presumptively correct and are accepted unless clearly wrong. The court of appeals therefore had power to set aside the determination of the Board of Tax Appeals if convinced, as it was, that the Board was clearly wrong. We are not called upon to separate factual from legal grounds of decision and to determine if reversal of the Board of Tax Appeals by the court of appeals could stand on questions of law alone.”²

Thus, it is clear that both the new Federal rules and prior Federal equity practice afford an appellate court much more discretion in reviewing the findings of fact of a trial court than in reviewing those of the Federal Trade Commission. When it feels that a trial court’s view of the facts is incorrect, it is free to consider all the facts and grant the petitioner proper relief. In doing so, it may determine the weight to be given conflicting evidence, draw its own inferences from the facts, and, having thoroughly evaluated the evidence, decide whether the whole record is inconsistent with the findings of the trial court. When reviewing the findings of fact of the Federal Trade Commission, the appellate court is practically forced to determine that no sane person could come to the conclusion at which the Commission arrived before it can grant relief to the petitioner. So long as the record is not “wholly barren of evidence” to support the findings of the Commission, those findings must stand.

The imposition of greater restrictions upon the appellate court when reviewing the findings of the Commission than when reviewing findings of a trial court has no justification. Neither the area nor the effect of the Commission’s activity

¹ Italic supplied.

² The First Circuit’s comment regarding rule 52 (a) in *Fleming v. Palmer* (123 F. 2d. 749, 751 (1941)) sharply contrasts is to the substantial evidence rule:

“A finding of fact is clearly erroneous if it is against the clear weight of the evidence. It does not suffice that it be supported by evidence.”

are substantially different from those of the courts. The Federal Trade Commission Act declares unlawful unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce, and charges the Federal Trade Commission with the responsibility of preventing use of such methods, acts and practices. These offenses against the community's judgment as to decent and moral business operations are not peculiar to the jurisdiction of the Commission. Most were bad at common law. Defamation, disparagement—including trade libel and slander of title—such interferences with business relations as passing off, misleading appearance of goods, misuse of trade secrets, false advertising, commercial bribery, and improper use of trade mark and trade name which the Commission deals with under this statute have traditionally and competently been handled by the courts. Business practices interdicted by the common law of restraint of trade and by the Sherman Act—which was enacted a quarter of a century before the Federal Trade Commission Act—are unfair trade practices under the Federal Trade Commission Act (*Federal Trade Commission v. Pacific States Paper Trade Association*, 273 U. S. 52 (1927)). If there are any practices forbidden by the Federal Trade Commission Act but not by other legislation or at common law, they are not more obscure or intricate, or more difficult to determine, and do not require more technical background to understand than, for example, practices forbidden by the Sherman Act.

Furthermore, the primary method used by the Commission to carry out its functions—and the only method with which the Reece bill is concerned—is through individual adjudication. The Commission charges alleged violators, holds hearings, and issues cease-and-desist orders, if it feels them to be warranted by the facts. Its orders are like decrees of courts of equity in scope and become final and binding in 60 days unless a petition for review in the circuit court of appeals is filed. Violations of the Commission's orders are subject to substantial penalty.

It may be that in some types of administrative determination administrative expertness warrants a greater degree of finality than judicial experience and background. This would seem to be particularly true where an administrative agency is drawing general rules for entire industries or areas. But the determination of questions of fact in specific situations is the type of problem with which courts deal daily. They can decide between conflicting views of experts on scientific questions as well as members of the Commission. Moreover, the Commission operates largely in a field where matters cannot be determined with mathematical precision or scientific exactness. Perhaps this is why the members of the Commission themselves are generally attorneys with training and background not dissimilar to that of members of the judiciary.

The Commission deals with a great number of difficult problems involving the practices of all of the innumerable trades, businesses, and industries which exist in the United States today. It is inevitable that, under such circumstances, even the most capable and well-meaning men will occasionally commit error. The function of judicial review is to reduce the possibility of such error without crippling the administrative process. When the Commission tries a case under the Federal Trade Commission Act, it is exercising no less a judicial function than does a Federal district court when, for example, it tries a case under the Sherman Act involving perhaps the exact same conduct. To say that the one is "judicial" and that the other is "pasi judicial" is to engage in idle semantics. It is only the fact of human fallibility and the possibility of error which require that there be adequate review of the proceedings of either a trial court or of an administrative tribunal. To warrant less appellate discretion in reviewing the findings of the Federal Trade Commission than in reviewing those of a trial court which handles comparable, similar and frequently the same subject matter as the Commission, it must be assumed that the Commission is more infallible and more impartial in the exercise of its functions than a trial court. This assumption is obviously untenable. In fact, there are a number of considerations indicating that the Commission should be subject to broader appellate review than the courts.

COMBINATION OF POWERS

The Federal Trade Commission fills the functions of investigator, grand jury, prosecutor, jury, and judge. Formal proceedings before the Commission are instituted either as a result of a complaint from an outsider, very likely a competitor and in any case no friend of a proposed respondent, or upon the Com-

mission's own motion. Upon the basis of a preliminary investigation by the Commission's staff, the Commission determines whether to issue a complaint, presumably giving substantial weight to its staff's recommendations. Obviously no one outside the Commission can know just what tests are applied in determining whether a complaint should be issued. The statute requires, however, that the Commission have reason to believe there is a violation, and it is plain that the Commission authorizes complaints only in cases where it is reasonably satisfied of a violation. The Commission's Annual Report for the fiscal year ending June 30, 1945, showed a total of 5,429 complaints since the inception of the Commission, of which 444 were undisposed at the end of the year; 196 cases had been closed for such reasons as death of the parties, retirement from business, or discontinuance of the practices in question. Twelve complaints had been rescinded and 31 had been disposed of by acceptance of trade practice rules. Of the remaining 4,746 complaints 3,808 were disposed of by an order to cease and desist or by a stipulation and only 938 were dismissed. In other words, once a complaint has been issued by the Commission a respondent has less than 1 chance in 5 of successfully defending itself.

Now, this is as it should be. The Commission should not put a businessman to the trouble and expense of defending a formal proceeding unless it has substantial grounds for believing that there has been a violation of law. If the Commission dismissed a great percentage of its own complaints, it would be subject to legitimate criticism. It must be recognized, however, that where the body which determines that a complaint shall issue decides whether that complaint is justified doubts inevitably arise. It is difficult to see how one who has recommended the commencement of a lawsuit can decide that lawsuit uninfluenced by his original recommendation.

Furthermore, each formal proceeding conducted by the Commission represents a substantial investment of the time and energies of the Commission's staff and of the funds appropriated for its use. Thus, there is necessarily psychological pressure upon the Commission to show some tangible result in the form of an order or stipulation rather than a record of failure in terms of a dismissal.

Against a background like this, the Commission's announced adherence to the rule that it has the burden of proof in a proceeding before it provides little practical protection to alleged violators. This is not meant, of course, to detract from the Commission's integrity or fairness. The Commission was established to prevent breaches of its statute. Presumably, it has what James M. Landis, dean of Harvard Law School, at one time a member of the Commission and later Chairman of the Securities and Exchange Commission, has described as "a proper bias toward the [administrative] point of view." Landis, *The Administrative Process*, page 104. Perhaps, from its very nature, it must have that bias. Perhaps it should have that bias. But, if this be the case, it is accordingly necessary and desirable that there be an external means of assuring that no person is injured by it. So long as the Commission's decisions are not subject to a more adequate review in the courts, it will be questionable whether persons appearing before the Commission can ever obtain the full hearing to which they are entitled. A prosecutor's office is subject to the check of ultimate decision by a court; a trial court to the check of real review by an appellate court. Where the prosecuting and judicial functions are combined in one body, the need for adequate review is enormously increased.

OTHER FACTORS

Under the Federal Trade Commission's procedure the actual hearings in disputed cases are before trial examiners—ordinarily subordinate employees of the Commission—who take and determine the admissibility of the evidence. Since the Commission does not see the witnesses, it does not have any more opportunity to judge their credibility than does an appellate court. Thus, it is difficult to see why the particular regard which is given to a trial court's determination in matters of credibility should apply in the case of the Commission.

Although the Federal Trade Commission Act is silent regarding the application of the usual rules of evidence, the Commission is not "restricted to the taking of legally competent and relevant testimony." *John Bene & Sons, Inc., v. Federal Trade Commission* (299 Fed. 468, 471 (C. C. A. 2d 1924)); cited with approval in *Opp Cotton Mills, Inc., v. Administrator* (312 U. S. 126, 155 (1941)); *Stanley Laboratories, Inc., v. Federal Trade Commission* (138 F. (2d

388 (C. C. A. 9th 1943)), in accord. Since the normal rules of evidence, employed by courts to protect the rights of the accused, do not apply to proceedings before the Federal Trade Commission, it would seem that less weight should be given to findings based upon the evidence introduced in such proceedings than the evidence introduced in court.

A recent trend in the cases has crystallized the problem of inadequate judicial review. In the past, the inability of the courts to correct clear error in the Commission's findings of fact was to some extent alleviated by the discretion which the courts exercised in modifying orders by the Commission to cease and desist which they deemed to be unjustified by the facts. This discretion, however, has only lately been circumscribed within limits at least as narrow as, and perhaps even narrower than, those circumscribing judicial review of the findings of fact.

The Circuit Court of Appeals for the Third Circuit was presented with this problem in *Jacob Siegel Co. v. Federal Trade Commission* (150 F. (2d) 751 (C. C. A. 3d 1944)), where there was a real conflict in the testimony. The court said:

"Although we sustain the Commission on its finding as to the name because of substantial evidence supporting that finding, we think strongly that the order is far too harsh. It destroys a widely and favorably known trade name, in existence for 14 years. It causes serious injury to the petitioner and its retail outlets. The infraction, as the case now stands, is slight and could be cured by simple qualifying language. We could dispose of the problem by modifying the Commission's order as suggested, if the practice as outlined in *Federal Trade Commission v. Royal Milling Co.* (288 U. S. 212, 53 S. Ct. 335, 77 L. Ed. 706) and *Federal Trade Commission v. Hires Turner Glass Co.*, supra, a third circuit case, was still the law. While the Supreme Court has not dealt with the question of remedy in a Fair Trade Commission suit since the *Royal Milling* case, there have been a number of opinions from that court concerning remedies prescribed by the Labor Board. In those cases the court has forcibly pointed out that the matter of remedy is also for the administrative agency" (p. 755).

After reviewing the authorities, the court concluded:

"It is evident, therefore, that the discretion as to the remedy in such controversy as this has now been vested in the Federal Trade Commission. That discretion has been exercised to totally prohibit the use of the name 'Alpacuna' to the petitioner. Since the Commission has such power, we are unable, in view of the evidence, to say that the power has been abused in this instance, though under the same facts and circumstances if we were still in control of the remedy, we would modify the order as above indicated" (p. 756).

That the third circuit's understanding of its discretion in this matter under the existing law and Supreme Court decisions is adequate appears clear from other Federal Trade Commission cases (*Hertzfeld v. Federal Trade Commission*, 140 F. (2d) 207 (C. C. A. 2d 1944); *Charles of the Ritz Distributors Corporation v. Federal Trade Commission*, 153 F. (2d) 676 (C. C. A. 2d 1944) and *Parke, Austin and Lipscomb, Inc., v. Federal Trade Commission*, 142 F. (2d) 437 (C. C. A. 2d 1944).)

CONCLUSION

It is submitted that the existing scope of judicial review over findings of fact and orders of the Federal Trade Commission is inadequate and that H. R. 2390 will correct this inadequacy.

Respectfully submitted.

NEWELL W. ELLISON.
ERNEST W. JENNES.

Mr. SADOWSKI. All right. We will hear Mr. Montague next.

STATEMENT OF GILBERT H. MONTAGUE, ATTORNEY AT LAW, NEW YORK CITY

Mr. MONTAGUE. I shall take at least 45 minutes, and I would much sooner come back next week, sir. I can come back to meet your convenience.

It was merely that I was asked by Judge Sumners and Congressman Kefauver to appear this morning before the House Judiciary Committee on a bill.

I explained my mission to Judge Davis—told him that because of this I hoped he would make my explanations to the committee.

I have just left there. Because of that, I would very much sooner start in some morning when you are going to resume because I shall have quite a bit to tell. I cannot finish this morning, anyway.

MR. SADOWSKI. We expect to resume next Monday when we adjourn today.

MR. MONTAGUE. I will be very glad to be here at 10 o'clock and go on Monday if that suits your convenience.

MR. WHITELEY. I am prepared to go ahead if you want another witness.

MR. MONTAGUE. I emphasize my apologies. Judge Sumners spoke to me yesterday afternoon. I explained my predicament. I then got in contact with Judge Davis. Then Congressman Kefauver spoke to me. They kept me until about 20 minutes ago.

MR. SADOWSKI. We will go ahead now and hear Mr. Whiteley.

MR. DAVIS. May I inquire whether you are going to continue this afternoon?

MR. SADOWSKI. We will not be able to continue this afternoon. We will continue until we get a call from the House, which may come within the next half hour.

MR. DAVIS. We just want to see how to arrange our plans, our witnesses.

Do you contemplate adjourning today until next Monday?

MR. SADOWSKI. That is right, Judge.

We still have that housing bill.

MR. DAVIS. That is perfectly all right. We have no objection at all, but I just wanted to learn definitely about it.

MR. SADOWSKI. We will go ahead on Monday morning.

STATEMENT OF RICHARD P. WHITELEY, ASSISTANT CHIEF COUNSEL, FEDERAL TRADE COMMISSION

MR. SADOWSKI. Give your name and your position.

MR. WHITELEY. I am Richard P. Whiteley, assistant chief counsel of the Federal Trade Commission. I have not been with the Commission since its inception like my predecessors, Mr. Kelley and Mr. Wooden. I am a comparative newcomer. I have been only with it the last 22 years.

During the last 12 years, I have been assistant chief counsel in charge of that part of the trial work before the Commission, with the exception of that which Mr. Wooden stated he was in charge of.

And so I have had under my immediate direction the cases growing out of the Wheeler-Lea amendment—that is, those amendments having to do with food, drugs, devices, cosmetics.

I am not going into the question of labeling, Mr. Congressman. I am going to confine myself primarily to a discussion of the section dealing with civil penalties and then making answers to some of the statements made.

Mr. O'HARA. No reference to the Food and Drug Act?

Mr. WHITELEY. I will not go into that.

Mr. SADOWSKI. The bell is being rung for the call to the House and we will have to answer the call.

I think Mr. Reece will want to ask some questions along this line.

Mr. WHITELEY. I will return any time the committee desires.

Mr. SADOWSKI. It would be better to come back Monday morning.

We will recess to next Monday morning at 10 o'clock.

(Thereupon, at 12 noon, Thursday, February 28, 1946, the committee recessed until Monday, March 4, 1946, at 10 a. m.)

AMEND FEDERAL TRADE COMMISSION ACT

MONDAY, MARCH 4, 1946

HOUSE OF REPRESENTATIVES,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D. C.

The subcommittee reconvened at 10 a. m., Hon. George G. Sadowski, chairman of the subcommittee, presiding.

Mr. SADOWSKI. The subcommittee will come to order.

STATEMENT OF GILBERT H. MONTAGUE, ATTORNEY AT LAW, NEW YORK CITY

Mr. SADOWSKI. Our first witness today is Mr. Montague. Will you state your name and your position?

Mr. MONTAGUE. Mr. Chairman and gentlemen of the committee, first of all, I want to express my thanks for being invited to come before this committee. I will begin by qualifying myself.

I taught on the general subject of antitrust law and economics at Harvard in 1901 to 1904, while I was a student in the law school. I became admitted to the New York bar in 1904, and during the period from 1904 to 1911, 1912, I did considerable work on the antitrust-law field and wrote a number of articles for the Atlantic Monthly and the North American Review and other periodicals on that subject.

I opened my own office in 1910. Since then a large part of my practice has been in this field.

In 1913 and 1914, particularly 1914, I was down here as a counsel and representative of the Merchants Association, which is the largest commercial organization, as I understand it, each of Chicago. It is now the Commerce and Industry Association of New York. I was here with the particular view to furthering the passage of the Federal Trade Commission Act.

In that connection, I saw a great deal of Justice Brandeis, who had a great deal to do with that, so from that time on I have been familiar with it.

Practice before the Federal Trade Commission has occupied me from the very first week that the Commission organized in 1915.

In looking through, I noticed that from the very first volume of the Commission's reports there has never been a month since then that I have not had to advise on a great many matters before the Commission.

Mr. REECE. If the gentleman will permit an interruption, he spoke about having had his economic training at Harvard. Being from New York University, I will admit that Harvard is a pretty good school, too.

Mr. MONTAGUE. I do not know what Congressman Reece means, but you and I have a good deal to expiate for the fact that we taught economics so far back as that. A good deal has happened since then.

One of my closest friends is Arthur Vanderbilt, Dean of New York University Law School, a man who has done a great deal of work on administration law. He and I have worked together at a great many problems and have spoken before a good many audiences.

I perhaps should also add that I have contributed articles on the general subject of the Federal Trade Commission to the annals of the American Academy of Social and Political Science, the Political Science Quarterly, the Quarterly Journal of Economics, the Political Economy, the Atlantic Monthly, North American Review, the Yale Law Journal, Columbia Law Review, Harvard Law Review, and George Washington Law Review.

I have spoken on that subject repeatedly by request of the association of the bar of the city of New York. I checked up and found my first address was given in 1915. Since then I have spoken at least half a dozen times before this association to show the progress of the law on this subject.

I have spoken before the New York State Bar Association repeatedly on the subject of the Federal Trade Commission Act. I have spoken before the Philadelphia Bar Association, before the bar associations in New York State, Massachusetts, Pennsylvania, Michigan, New Hampshire, Wisconsin, and two or three other States, so that altogether I have been doing a great deal of practicing and a great deal of talking and a great deal of writing on the subject which has required me to keep in very close contact with the Commission, I might say monthly, in many cases weekly, from 1915 to the present date.

Mr. SADOWSKI. You certainly have a fine background to qualify you as a witness.

Mr. MONTAGUE. I have repeatedly served on committees of the Chamber of Commerce of the United States and the National Association of Manufacturers and the National Industrial Conference Board, and a great many other associations of businessmen dealing with problems on this subject during the past 30 years.

Just last month, or rather, in January, I was asked, because of my previous experience, to speak on phases of Federal Trade Commission practice at a conference in New York at which a number of lawyers were present. I was complimented by the New York Law Journal requesting the privilege of printing my address, which it did, serially, for three successive issues of the New York Law Journal, at the end of January and early February, I have been living with this subject intensively for 30 years.

Mr. REECE. You spoke about having addressed the New York bar. May I ask if the food and drug division of the New York bar is in harmony with the views which you contemplate expressing to this committee?

Mr. MONTAGUE. I am afraid you will find that some members of that section are not in harmony, but I did speak, as I say, at the end of January, at that symposium which they had on the Robinson-Patman Act, and I gave the initial introductory outline of that subject which was published serially.

Mr. REECE. You may be more convincing before the committee than you were before the New York bar.

Mr. MONTAGUE. I will try not to take up too much time. I will demonstrate how I differ with several of the lawyers whom you have listened to, and I think it will be rather interesting to compare my views with theirs, because I know you will weigh them judicially.

I might also add this that unlike all of the other lawyers who have appeared before you, I am paying my own expenses. I have no retainer. I have not discussed what I am saying with any client. I shall bill no client for what I say. I am down here speaking simply from my own experience. I have no doubt that a number of my clients might disapprove, perhaps, of what I say. I have yet to find a client who, when he is hooked by the Federal Trade Commission, does not hope that they will get abolished, but pretty soon something happens in which he is pretty glad to have it function as against one of his competitors.

So, I am absolutely a free man here at my own expense, whereas every lawyer you have heard is speaking for a client.

I will begin my discussion of the Reece bill by first giving the background of what appears on pages 4 and 5 of the Reece bill, and I will begin with the background of section 15 of this bill, dealing with false advertisement as it applies to food, drugs, and cosmetics.

Prior to 1938, the Food and Drug Administration had jurisdiction over misbranding of food and drugs, and misbranding, as interpreted in the Food and Drug Act, and as stated there, that included labels, brands, and statements on packages that deceived or misled purchasers of food and drugs.

The process of the Food and Drug Administration was to go ahead by prosecution through the district attorney, and it was in the United States district courts. And there were many fines, and there were condemnation proceedings by which there was a forfeiture of goods which were misbranded. And there was also destruction of misbranded goods.

I speak of the severity of the penalties which were enforced by the Food and Drugs Act up to that time. It covered only the subjects which I have spoken of; namely, misbranding, and, dating from about 1935, there was a strong agitation among consumer organizations which was reflected also by the officials of the Food and Drug Administration that there were a number of subjects which were not covered; that there should be in the Food and Drug Administration power to consider representations which, by word or statement, suggested things which were not true, and also by failure in their advertising to reveal facts which were material in the light of representations, and particularly, and this is part of the agitation, material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement or under such conditions as are customary or usual.

There was a reason for that agitation. There were a number of new drugs or new proprietary preparations which had had rather disastrous consequences, and there were also a number of cosmetics,

a number of hair dyes, which had had very injurious consequences, and so this became very soon practically an irresistible impulse to change the Food and Drug Act.

There were a number of people in the industry, in the food industry, and also some of them in some branches of the pharmaceutical industry, who were prepared to fight it out on the line of an amendment of the Food and Drug Act to accomplish this purpose, but the Proprietary Association, advised by Mr. Hoge, took a different view. And I would like at this time to speak of Mr. Hoge.

He is one of the most brilliant lawyers that I know of. He has been a friend of mine ever since he left law school. In the first job that he had, he and I worked together, so I had occasion to see him for the past 25 years. He is one of the ablest men that I know of. He has had a phenomenal record at the bar, and I think that if anybody can testify, and I know that Congressman Reece can, he is a perfectly superb man to work with and a charming personality.

I speak of that because——

MR. REECE. He is the kind of man that, in the South, we refer to as a scholar and gentleman.

Along that same line, in view of the inference that one of the witnesses made that certain lawyers who represent some proprietary medicine companies seem to be the sole proponents of the measure with which I, of course, disagree; you are familiar with such men as Mr. Hoge, Mr. Charles Murphy, and Mr. Isaac Digges, and Mr. Kelley and Mr. Perry, and most of the attorneys, I presume, who appeared here. Are they men and attorneys of ability and standing in their profession?

MR. MONTAGUE. Mr. Hoge, particularly so. The others I simply know nothing against, but I think I will demonstrate before I get through that they are testifying here for their clients, giving you only half of the truth in respect to the situation, doing as lawyers have to do when they have retainers in their pockets, and I think you will see that when in that status they come in and state some of the things that they have said here to which I think I can refer and which I can clear up, you will understand that, after all, they are lawyers, working for their clients, and relying on the other side to show up the other side against them. It is only half a statement they have made. Perfectly reputable. I do not in any way question their legal right to do so, because that is what lawyers do when they get into court, but I am down here speaking against them. If you will give me the chance, I will show why I differ with them, and I am doing it for no other motive than that the full truth come out.

MR. REECE. If a further interruption would not disturb your line of argument at this time——

MR. MONTAGUE. I would much prefer to take that up after you have heard what I have to say. I would like to go ahead and tell you why I have indicated that I will differ with them.

MR. REECE. All I want to do at this time is to quote a paragraph from a speech which you made and which was inserted in the Congressional Record——

Mr. MONTAGUE. May I take that up, too, because I will tell you—

Mr. REECE. On April 9, by Senator Hawkes of New Jersey, which reads as follows:

As litigant, the Government has advantages of unique prestige, unrivaled powers of publicity, specially trained legal talent, and inexhaustible resources. Such Government agencies as the Federal Trade Commission and the National Labor Relations Board have also the advantage that in all of their prosecutions, they are both prosecutor and judge and are empowered by statute to make decisions in their own favor, even though such decisions be contrary to the weight of the evidence.

Mr. MONTAGUE. That opens up another subject. As I say, if you will keep that in mind, and wait until I get through, I will completely explain just why that statement is true, and why what has been said by these lawyers is not the complete truth, sir.

Mr. REECE. That is why I was reading it at this time so you would have it in mind.

Mr. MONTAGUE. I ask you to be patient. It will take some time to demonstrate, and at the close, I would like you to read that again and I will show you exactly why that statement that I made is absolutely true, and yet the things which have been said against this Commission by the lawyers who preceded me are half truths, and in some cases, absolutely are untruths. And I have to say that in respect to Jimmie Hoge as well as these other lawyers. That indicates something of a clash, and you will have to give me some time to demonstrate it.

I have shown what the issue is. So, please do not interrupt me until I can get my statement in, sir.

Mr. REECE. Since you have stated that Mr. Hoge is a man of—

Mr. MONTAGUE. A man of honor, but, also a lawyer speaking for his client and being paid by his client, to come down here and speak.

Mr. REECE. You have stated that he made statements which are half truths. I think you should not make such statements unless you are able to back them up.

Mr. MONTAGUE. And in regard to what the Federal Trade Commission does are not true. I will demonstrate that before I finish.

Mr. REECE. Some of them as being—

Mr. MONTAGUE. And please do not interrupt me until I can get my statement in. You will exactly understand why. With all of my admiration and affection for Mr. Hoge—

Mr. SADOWSKI. I think it is only fair—

Mr. MONTAGUE. I, nevertheless, differ with him.

Mr. SADOWSKI. I think it is only fair that when a witness comes before this committee, to make a statement, we should give him a chance to present his argument and then ask the questions afterward.

I know the deep interest that you, Mr. Reece, have in this bill. It is your bill, but I think, in all fairness, we ought to let the witness proceed and then you ask your questions when he gets through.

You may proceed, Mr. Montague.

Mr. MONTAGUE. At that point, I said that the Proprietary Association of which Mr. Hoge is counsel took a different view. Their view was that the best way out of that situation for the benefit of all of their members, and they represent people who are making these

medicines and making these preparations, under attack, was to get out from under the Food and Drug Administration, which had these criminal prosecutions and these forfeitures and condemnations, and get over into the Federal Trade Commission, because the Federal Trade Commission had not any criminal process. All that the Commission did was, first of all, to serve a notice of a complaint, give the defendant the opportunity to come in, prove whether he should or should not have an order against him, and then after a trial and a duration of hearings, which might last for several years, the most that the Commission could do would be to issue an order to cease and desist which carried no penalties unless there was thereafter a violation of the order.

Altogether, the pasture looked a great deal greener over in the Federal Trade Commission than it did with the Food and Drug Administration.

So, Mr. Hoge's idea, which was a very brilliant conception, was accepted by the proprietary people. Some people in the food industry seemed to think that they would get along better with the Federal Trade Commission than they could with the Food and Drug. But a considerable number of the people in the medical preparations field, the pharmaceutical industry, thought they would prefer to stay with the Food and Drug Administration.

There was thereby this contest. The Federal Trade Commission, as I recall, took no part in it, excepting that they were quite unwilling to have jurisdiction which they had heretofore had in respect to advertising taken away from them and put in the Food and Drug Administration. The latter were quite keen to have anything more they could have, because they had spoken very strongly in favor of an improvement, by the amendment of the law, of the Food and Drug Administration. And so, over a period of between 1935 and 1938 this fight raged.

Finally there was an attempt on the part of Congress to reconcile this fight. Senator Copeland took a strong view in that case for the Food and Drug Administration. Congressman Reece participated with others in trying to do something which would in some way harmonize this great fight as to whether the Food and Drug Administration should be denuded, or should be given the new powers or whether they should be turned over to the Federal Trade Commission, so that finally, as the result of all of this, there was an amendment first to the Federal Trade Commission; and that is why we got section 15 of the Federal Trade Commission Act, and also a few months later, some amendments to the Food and Drug Administration Act.

As to the Federal Trade Commission Act, I want to read the way in which the section was written up for the Federal Trade Commission Act.

The additions which were made to the Federal Trade Commission Act begin with the present sections 12, 13, 14, and 15. I will run over them very briefly until I get to section 15, which is now the subject of the proposed amendment in the Reece bill.

Section 12 (a) added this provision:

That it shall be unlawful for any corporation or person to disseminate any false advertisement which may induce the purchase of food, drugs, devices,

or cosmetics, and that that shall be an unfair or deceptive act or practice in commerce within the meaning of section 5.

I mention this just for the continuity of what provisions were added, and there is no attempt in the Reece bill to change that.

Next was added section 13, which stated, I am picking out the high points in the section, that whenever the Commission has reason to believe that any person engaged in or about to engage in dissemination of an advertisement which is in violation of section 12, which I have just read, the Commission may make an application to enjoin in any court of the United States. There is no attempt to vary that. I merely mention that to indicate the scope of the additions which were made in 1938.

Then comes new section 14: Any person, corporation, and so forth, shall, if the use of the commodity advertised may be injurious to health, be punished by a fine or imprisonment, and so forth. There is no change in that.

Then there were various provisions as to exempting publishers and advertising agencies, and so forth, under certain conditions, and then comes section 15, which is to be changed if the Reece bill becomes law. That provides, briefly, this:

The term "false advertisement" means an advertisement other than labeling, which is misleading in a material respect, and in determining whether any advertisement is misleading, there shall be taken into account, among other things, not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual. No advertisement of a drug shall be deemed false if disseminated only to members of the medical profession.

Now, the Reece bill proposes to lop off from section 15, as I have read it, this provision:

or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement or under such conditions as are customary or usual.

That particular provision was one of the things which was agitated from 1935 to 1938 by consumers organizations and by people generally; a large number of Congressmen were extremely eager to have that. That was really one of the things which started the necessity of having a strengthening of the Food and Drug Administration and that section, that is, that part of that section, is struck out by the Reece bill. There has been very little said heretofore as to that, and the only statement which has been made, if I can quote Congressman Reece's own statement, which was sent to me, was that this is done to harmonize with the Food and Drug and Cosmetics Act as it now stands.

There cannot be any harmonizing resulting, because there is a corresponding provision in the Food and Drug Act as it now stands and as amended in 1938, and the only possible result of the passage of the Reece bill, as it now stands, will be to destroy, take out from the Federal Trade Commission Act, one of the essential things which was desired in all of the agitation from 1935 to 1938, in which Senator Copeland and other Senators and Congressmen, eager to meet this demand because of these consequences, which occurred, wanted to have that stopped.

Mr. REECE. Mr. Chairman, you are now discussing the provision of the bill for the control of labels and warnings. Adequate provisions were written in the food and drug bill for such control.

Mr. MONTAGUE. I am discussing the Federal Trade Commission Act. I am not discussing the Food and Drug Act.

Mr. REECE. And the Food and Drug Administration is the agency that is primarily charged with conserving the health of the public, and it was the agency which we gave the facilities, the laboratory facilities and the technical facilities to enable it to determine the therapeutic effect of the various medicines, and charged that agency with the responsibility of doing so.

Now, then, I presume you may have seen the letter of the Administrator of the Food and Drug Administration under date of July 13, 1945, submitted to me with reference to the provisions of the bill, in respect to those provisions to which you are now referring, and it closes with this admonition:

I shall be delighted to be of all possible assistance to you in your purpose to eliminate difficulties that have characterized the administration of legislation for the control of food, drug, and cosmetics. When the Congress decided in 1938 to delete the advertising provision from the food and drug and cosmetics bill, we accepted the decision philosophically. I am not urging that regulatory control of these commodities be combined under any particular agency. The important thing is the character of the control legislation. In my judgment it should provide for similar procedures against defenses of adulteration, misbranding, and false advertising, so that allegations on all three can be combined in a single action when the facts warrant. It should provide that the issues be tried initially in the Federal courts. It should vest clear responsibility for enforcement in a single agency. It should not interfere with the operation of the existing legislation to control unfair practices that do not come within the statutory definition of adulteration, misbranding, and false advertising.

And as you have just referred, Mr. Montague, the original food and drug bill, S. 2000, and its comparable bill, which was prepared in the Department of Agriculture, at that time referred to as the Tugwell bill, vested all advertising, the authority and control over all advertisers relating to food and drug in the Food and Drug Administration, thereby taking it out of the Federal Trade Commission.

And, as you have stated, I interested myself in trying to harmonize the supervision and permit the Federal Trade Commission to retain general jurisdiction over advertising of food, drugs, and cosmetics, along with authority over other advertising, but we were particular in the efforts to permit the authority over misbranding and labeling to remain in the Food and Drug Administration of the Department of Agriculture. And, no doubt, you are familiar with the various statements which were made in the report of the committee on the Lea bill, and on the Pure Food Drug Administration bill and with the speeches on the floor of the House in which that was clearly enunciated and that the witnesses for the Federal Trade Commission, when before our committee, stated that they had no intention at that time of exercising authority over misbranding and labeling, and were not of the opinion that the bill did give them that authority which was later given to them through the interpretation of the courts. The Food and Drug Administration is the agency that is charged with the responsibility of protecting the health of the public.

The reason I am making this statement at this time was the inference that might be drawn from what you said that I was intending

to weaken the Food and Drug legislation in some way so as to loosen the control, so far as protecting the health of the public is concerned. And that certainly is not the purpose, nor the effect of my bill. All the consuming agencies at the time this question was before the committee originally advocated giving full control over all advertising relating to foods and drugs to the Food and Drug Administration and take it away from the Federal Trade Commission entirely. They said they were then fearful dual control would result in conflict.

I do not want us to get off on to a discussion to indicate that anybody is intending to weaken the Food and Drug Administration legislation which, of course, we are not.

Mr. MONTAGUE. You are interrupting with your own statement my own, and I would like very much to make sure that you have now said everything that you wish before I take up.

Is there anything you want to add to what you have just said, because—

Mr. REECE. Mr. Chairman, there is a very good way by which you can attain my seat here, and that is to run for it. And then if I want to attain your position before the committee—

Mr. MONTAGUE. I have the greatest difficulty presenting my statement, if I am constantly interrupted by long statements from you, and I thought if you would complete your remarks on that subject, and then be patient while I reply, I will take up your statement seriatim, because it has covered much ground, but I cannot do it being constantly interrupted.

I think the stenographer has more statement from you than he has from me as it stands now.

Mr. REECE. Mr. Chairman, the purpose of my interjecting a statement at that time was the statement by the witness which indicated that I was in favor of weakening the Pure Food and Drug Administration so as to impair the health of the public.

Mr. MONTAGUE. I made no such statement about you. I did say that the purpose of the Proprietary Association was very distinctly to give to the Food and Drug Administration no increase of power, but to put it over in the Federal Trade Commission, where they knew the process was so much easier and softer that it would amount to a softening of the situation for anyone which might come in.

I do not say that you shared that purpose, but you helped to further it, and I know it was their purpose because they so stated.

Mr. REECE. That is not correct.

Mr. MONTAGUE. The accusation runs to the Proprietary Association and to the people backing it, and insofar as you furthered it, I do not accuse you of knowing what their purpose was, I do not say that you knew you were going to do that, but that is what they wanted to have happen, and that is what did happen.

Mr. REECE. Dr. Dunbar, who is the Administrator of the Food and Drug Administration, charged with the responsibility of protecting the health of the public, says my bill will strengthen his position in accomplishing that end.

Mr. MONTAGUE. Have you finished your statement?

May I answer it now? Every time I start to answer, you break in. I would very much like, as I have paid my own expenses and hotel and

travel expenses to come down here, to be allowed to get in my statement.

Mr. REECE. I am going to interrupt the witness just as little as possible, but I do not want him to commit me.

Mr. MONTAGUE. I think I have exonerated you from this, but not the people who have been pushing it, and insofar as you followed along in their purpose, you helped further a purpose which I do not accuse you of knowing what you are doing, but they knew what they were doing.

Now, you have quoted—

Mr. REECE. Mr. Chairman, I do not like that inference for two reasons: In the first place, I do not like the inference that I may have done it knowingly; and, in the second place, I do not like the inference that I did it not knowing what I was doing, and, therefore, was being duped by somebody else.

Mr. MONTAGUE. I do not say that you were duped. I say that you did not have foresight to see what could happen. Now, it has happened, and again, I ask, may I be allowed to make my statement; if I may proceed, Mr. Chairman.

Mr. SADOWSKI. After all, Mr. Montague is the witness before the committee this morning. We want to hear Mr. Montague.

You may proceed.

Mr. MONTAGUE. Dr. Dunbar has been quoted many times. The first thing I learned in poker was that an ace would beat a five spot, and I will now quote from Paul McNutt, who at that time was the Administrator, and therefore stands over, in the Administration of the Food and Drug, considerably above Dr. Dunbar. Here is what Mr. McNutt said in his letter to the chairman of this committee, in a letter which I will read you dated May 3, 1945, and it bears specifically on exactly the thing that I am now speaking of in the amendment, which the Reece bill proposes to section 15. I am quoting now Administrator McNutt:

Section 3 of the bill would amend the definition of false advertisement in section 15-A of the Federal Trade Commission Act. The amendment would change a provision of the act which is identical in its import with the provision of section 201 (n) of the Food, Drug and Cosmetics Act. It would repeal the mandate of the present law to the administrative agency and to the courts—

I am speaking of the mandate now to the Federal Trade Commission—

to take into account in determining whether representations for an article are misleading, failure to reveal facts, material with respect to the consequences which may result from the use of the article under the conditions prescribed in those representations, or under such conditions as are customary or usual. In deleting this mandate, we think the conclusion is inescapable that the standard of truthfulness set up by the statute is lowered. While the amended language would perhaps be construed as broadly as the original provision it is by no means apparent how the courts could do so in the light of the legislative history created by Mr. Reece's declared purposes in making the change.

Now, that is an absolutely correct statement. It is made by Administrator McNutt. It has never been withdrawn. If I had time, I could show you that Dr. Dunbar does not attempt to get away from it. He merely says, if you are going to give a lot of power, he would prefer to have it in the Food and Drug Administration, but as an interpretation of the purpose of this new change; namely, to delete the words which I read, it shows that there will be a weakening not

only of the Federal Trade Commission Act, but also automatically and as a consequence a precedent for amending similarly the Food and Drug Administration.

Here is what Mr. Reece is taking out, and here is where he has been rejected, or at least has been opposed by the Administrator, Mr. McNutt. These are the words in the present law which will be struck out, if this Reece bill is passed:

On material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement or under such conditions as are customary or usual.

Mr. McNutt says that is weakening it. It is perfectly apparent that it is weakening it. It is one of the chief things which, in 1935 to 1938, they wanted to put into the law, and now it is being taken out, and there has been, up to the time that I came here this morning, mighty little reference to that by all of the lawyers before, yet that is the thing which all of their clients want to have struck out, that is the thing for which they have retainers to come down here to strike out, and I am apparently the only lawyer who is willing to spend his money to come down here and call attention to what is being done.

Now, going on—

Mr. REECE. So far as you know, you are the only lawyer?

Mr. MONTAGUE. Now, I will take up one more, because your statements have covered a great deal of ground. I want to cover another one.

The suggestion is made by Mr. Reece that the purpose of section 15 was to take all out in respect of anything of labeling, and put it over in the Food and Drug Administration, and to give to the Federal Trade Commission just the advertising.

I hope I have demonstrated that if that was the only purpose of this legislation, it still does not explain why this particular clause should be struck out. That thing has never been explained, and it cannot be explained, but now coming further as to whether there was or was not the intention on the part of the Congress to give everything regarding labeling to the Food and Drug Administration, and to take it all out of the Federal Trade Commission, I would like to call attention to this:

In 1938, when this legislation was passed, I was asked by the legal departments of a considerable number of companies as to whether the phrase in this section 15, "the term 'false advertisement' means an advertisement, other than labeling," would take away any of the jurisdiction which the Federal Trade Commission, up to 1938, had been asserting in a number of cases regarding labeling under old section 5 of the Federal Trade Commission Act.

Old section 5 of the Federal Trade Commission Act, passed in 1914, provided as follows:

Unfair methods in competition in commerce are hereby declared unlawful.

In a case which went to the Supreme Court in 1922, the Supreme Court of the United States had held that that clause gave the Commission power to order a change in label if the label deceived. That case is *Federal Trade Commission v. Winsted Hosiery Company* (258 U. S. 483), and prior to 1938, this case had been repeatedly followed.

by various circuit courts, in *Royal Baking Company v. Federal Trade Commission* (281 Federal 744), in *Federal Trade Commission v. Kay* (35 F. (2d) 160), in *Federal Trade Commission v. Good Grape Company* (45 F. (2d) 70), and in *Federal Trade Commission v. Morrissey* (47 F. (2d) 101), so that when the question was put to me by the legal departments of a number of companies in the food and in the drug business as to whether there would be any change in the law in consequence of this section 15 that I have just read, I told them, as I had to tell them, that so far as the previous administration of the Commission under old section 5 was concerned, there would be no change at all, and that all that section 15 accomplished was that so far as it relates to the particular remedies in sections 12, 13, 14, and 15, added by that legislation, it might be contended that they did not go to labeling, but it could no possibly affect a repeal of old section 5 of the law under which the Supreme Court in the Winsted case and these other circuit courts of appeals in the other cases had upheld the Federal Trade Commission jurisdiction on labeling.

That was known by a number of lawyers. I am told that an effort was made to interest Mr. Hoge in that situation, but Mr. Hoge said that he did not believe that was so, and that was the difference. It is unfortunate that he should have made a legal blunder. The only reason he is now before you again asking for a change of the law, is that he did make a legal blunder. Those decisions were in the reports in 1938, and were thereafter adhered to by the courts. That is the only reason why the Commission has been carrying on as to labeling. It was perfectly apparent, I contend, to any competent lawyer familiar with his subject, and knowing what the decisions were, that is what the courts would say, and that is, if I may say so, exactly the situation in respect to labeling.

Mr. REECE. May I ask, if it was your view at the time the Food and Drug Act and the Wheeler-Lea Act were passed, that the Wheeler-Lea Act gave to the Federal Trade Commission jurisdiction over labeling?

Mr. MONTAGUE. They had that jurisdiction from 1914 on. They had been constantly exercising it. They did not need to have it new.

Mr. REECE. I mean under those two acts.

Mr. MONTAGUE. You asked if they knew they had jurisdiction over them, and I said they had already had it, insofar as labeling is concerned.

(Mr. Rabin assumed the chair.)

Mr. RABIN. I suggest that you permit Mr. Reece or any member of the committee to finish his question before you start answering it.

Mr. REECE. Thank you. Was it your interpretation and thought when the Wheeler-Lea Act and the Food and Drug Acts were passed that the dual jurisdiction over labeling was purposely established giving both the Federal Trade Commission and the Food and Drug Administration concurrent jurisdiction over those subjects?

Mr. MONTAGUE. I said that would be the result if that legislation were passed. And I recall that I stated that it would be exactly that same dual administration which now exists in respect to the Sherman Act, in which a restraint or a monopoly can be prosecuted by the Department of Justice under the Sherman Act, and also can be prosecuted by the Federal Trade Commission under section 5 as an unfair practice of competition.

There is nothing new in the law in respect of dual administration. Congress has repeatedly done it. The courts have repeatedly sustained it. And I told those friends of mine, who said they were in hopes of getting it separated, that their legislation would not have that effect and that, if anything was certain, it looked as though the courts, when they are confronted with it, would give under section 5 of the Federal Trade Commission Act, continued jurisdiction in respect of labeling.

Going on now—

MR. REECE. I might add by a statement, and not a question, that the report of the Committee on Interstate and Foreign Commerce, stated explicitly that it did not give, was not expected to give control over labeling. Likewise, the statements made by Chairman Lea and various members of the committee on the floor, gave assurances not only to Congress, but to the various consuming agencies, that jurisdiction over misbranding and labeling was left in the Food and Drug Administration. I am not unaware of the fact that in the interpretation of section 15 (a) by the courts later, that the Federal Trade Commission was given jurisdiction over misbranding and labeling.

If that power was vested in the Commission by reason of the interpretation of the courts, it is now my purpose to try to resolve.

MR. MONTAGUE. You are trying by this legislation, sir, to repeal by legislation a decision of the Supreme Court of the United States, which was rendered and read by all of the bar in 1922. Now, that was known perfectly well in 1938. Any well trained lawyer on this subject would have been able to tell you. I have given to you four other cases besides the Supreme Court decision in which it was stated. I reread before I came down here the reports of the committees you speak of. It is true that those reports said that the legislation which they reported did not give anything new to the Federal Trade Commission on that, but they refrained from stating that already the Federal Trade Commission, under old section 5 of the act, had that jurisdiction in respect of labeling, and had repeatedly exercised it, and had repeatedly been sustained by the circuit court of appeals and by the Supreme Court of the United States in exercising it. So there is nothing which can be regarded as a misstatement in any of those reports, because they were referring merely to what the new legislation did, and they were correct in stating that the new legislation did not give that to them, but those reports did not conceive it their duty to act as general legal advisers by telling them that the law, since 1914, had already given that to the Federal Trade Commission, and that the Supreme Court of the United States and repeated decisions of the circuit courts of appeals had sustained the exercise of that legislation, and that there was nothing in this new legislation which changed that subject.

MR. REECE. I am not sure whether I will agree with your statement that it was not the duty of the Federal Trade Commission to reveal to the committee, considering the legislation, the full authority which the Commission might feel that it would have if the bill should be passed, because that was the purpose in bringing the representatives of the Federal Trade Commission before the committee to give the committee full information on that, but, as I recall, and I am quite sure I am correct, the Commission's representatives did make it plain to the committee that it was not the purpose of the Federal Trade Commission to exercise jurisdiction over labeling. And if you will

go back and read the testimony of Judge Davis, a distinguished member of the Commission, which he gave to the Senate committee on old S. 2000. I think you will have to draw that inference from the testimony that he gave.

Mr. MONTAGUE. I have read all of that testimony, too, Congressman, before I came down here, and if I may say so, there is nothing whatever to indicate that the Federal Trade Commission ever made any such broad statement as you have quoted. I hate to differ with you, but that is a fact.

The Commission repeatedly indicated how it had exercised its jurisdiction. The Winsted case was spoken of a number of times.

The suggestion that you have made that the Federal Trade Commission, or any of its representatives in those hearings in 1936, 1937, and 1938, should have told the committee that they were not in the future going to exercise jurisdiction, which they had previously exercised and which the Supreme Court of the United States had told them they could exercise, would have been a most astounding and extraordinary and improper statement for them to have made.

Surely, the Federal Trade Commission officers would never have gone before that committee and told your committee they did not have the jurisdiction which the Supreme Court of the United States had said they could actually exercise under the Winsted case, and which repeatedly they had exercised and which the circuit courts of appeals said they could. They never told your committee or anybody else's committee that they were not, in the future, going to exercise that jurisdiction, because forsooth they would have been violating their oath of office if they had ever made such a statement.

Mr. REECE. May I call the witness' attention to another paragraph in the letter from Dr. Dunbar, Administrator of the Food and Drug Administration:

In November 1942 we instituted a seizure action under the Food and Drug and Cosmetics Act against a shipment of tablets, alleging on the basis of what we consider to be conclusively scientific proof that the representations in the labeling were false and misleading. These representations were identical with those submitted in the report of compliance to the Commission. Both the district court and the circuit court of appeals held that the doctrine of *res adjudicata* applied and the action under the Food and Drug and Cosmetic Act was barred. In its decision the circuit court said: "We therefore have the incongruous situation of one branch of the Government approving the method now pursued by the claimant and another branch seeking to condemn it. This is, to say the least, placing claimant in an embarrassing situation and should be avoided if possible."

Mr. MONTAGUE. May I discuss that case?

There was a case in which once more you have a case of that dual administration which I had warned my clients would occur and which, for 25 years, or for more than 30 years, we have seen in the Sherman Act, and once more was brought about in this 1938 legislation; namely, that in respect of labeling, the Food and Drug Administration, on the same state of facts, could take jurisdiction by their criminal procedure, and so on, of something which the Federal Trade Commission, under section 5, could take jurisdiction of by their less drastic process.

The case you speak of happens to be this state of facts: The Federal Trade Commission did take jurisdiction of the state of facts referred to by Dr. Dunbar.

They said, this is a violation of section 5, which is in our act. They said, however, if you will make certain changes in respect of your advertising and your labeling, you can do that.

Thereafter, the Food and Drug Administration, trying to be more drastic and to have a sterner interpretation than the Federal Trade Commission had given after a full hearing, tried to prosecute and, very properly, the circuit court of appeals said, or it was the district court, "This is a situation which is now *res adjudicata*, and because the Federal Trade Commission has had a laxer, not so drastic, interpretation as applied to your facts, we are not going to listen to you to prosecute."

There is the situation. And it is very singular, indeed, that it should be put forward by a proprietary association man, where the Federal Trade Commission was taking a view more favorable to the proprietary medicine than was to be taken by the Food and Drug Administration, and the *res adjudicata* helped out the proprietary association man.

Now, once more I am not particularly interested, if I may say so, in having Dr. Dunbar quoted in opposition to his chief, and I say that when you carefully examine Dr. Dunbar's statement, you will see that he does not detract in the slightest degree from the broad statement that I have read to you, given by Administrator McNutt, which is that when your bill is passed and takes out the language I have read to you from section 15, you have weakened the situation, both as regards the Federal Trade Commission Act and as regards the Food and Drug Act.

(Mr. Sadowski resumed the chair.)

Mr. REECE. In deciding whether a drug is properly labeled does not the Commission necessarily have to determine the therapeutic value of the drug?

Mr. MONTAGUE. I do not say so necessarily. I do not know. I cannot get into these generalizations unless you want to have me stay here the whole week.

Mr. RABIN. Is that not the crux of the question?

Mr. O'HARA. I would think so.

Mr. MONTAGUE. It may or may not be. That question is like asking, How old is An?

Mr. REECE. No; I hardly think so, Mr. Montague, in all fairness. That seems to be a very reasonable question.

Mr. MONTAGUE. It is not, I might say, and if you were a practicing lawyer on this subject, until you knew the state of facts, you could not tell whether it did or did not have to pass on the therapeutic value.

Mr. REECE. Certainly, in some instances.

Mr. MONTAGUE. If you want to break me up, and prevent me from making my statement, you are accomplishing it very successfully.

What I would like, as we have to do in court, namely, is to let me make my statement and you make yours.

Mr. REECE. Certainly, in some instances the Commission would have to determine the therapeutic value.

Mr. MONTAGUE. Not necessarily, sir.

Mr. REECE. Whether it was misleading.

Mr. MONTAGUE. They may or may not have to in that.

Mr. REECE. Except in your statement.

In those instances where they may have to do so, what staff and laboratory facilities does the Commission have to enable it to do so?

Mr. MONTAGUE. I would have you put that question to the Commission, sir. All I know is that they have done it very completely in many cases, but when you ask me how their internal organization is composed, that question does not belong to me. I am here as an outside lawyer. You are asking questions which can be answered only by a member of the Commission, and I respectfully request the opportunity of continuing my statement.

Mr. REECE. Since you are dealing with that subject, I thought it ought to be developed so that one reading your statement would not be in a position where he would not be able to draw a logical conclusion, which I am sure you are interested in.

Mr. SADOWSKI. You may continue.

Mr. MONTAGUE. May I continue?

Mr. SADOWSKI. Yes; you may continue.

Mr. REECE. Mr. Chairman, now I want to beg the witness' indulgence. I want to beg the witness' pardon, if I appear to interject too much, but my only purpose in doing so, Mr. Montague, is not in any spirit of antagonism, but rather when these subjects are discussed, to try to be of assistance to you, as I am sure you want to do in developing the particular question under discussion, so that the proper interpretation can be given to what you say, taking all aspects of it into consideration.

Mr. MONTAGUE. Have you finished your statement? I will proceed if I may.

I think I have discussed section 15, the amendment to section 15 on page 4 of the Reece bill, and I come over to the phrase on page 5, under section 4 of the Reece bill, by adding this clause:

(f) The term "labeling" means all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article—

and then the addition of section 19—

Food, drugs, devices, and cosmetics shall be exempt from the provisions of this act to the extent of the application or the extension thereto of the Federal Food, Drug, and Cosmetic Act, approved June 25, 1938, as amended.

In the letter which I read to you from the Administrator, Mr. McNutt, he said that he could not see, for the life of him, how that would possibly have any change or make any difference to the act, and it certainly would not accomplish what was intended by Mr. Reece's statement, as I have just heard it here, unless it meant to accomplish an amendment of section 5 of the act, which has been in the act ever since 1914, and under which all unfair methods of competition and commerce are forbidden, and under which labeling has repeatedly been asserted as being an unfair method of competition, and as to which, ever since 1922, the Supreme Court of the United States, has held that it could be done.

Administrator McNutt opposed that, and I oppose it. And insofar as anything can be dug up from any letters of Dr. Dunbar, I once more say I was taught that an ace could beat a five-spot, and there is nothing in the record which, in any way, retracts anything said by

Administrator McNutt to the chairman of this committee in his May 3, 1945, letter that I have read.

I now come to a provision at the top of page 4 in the Reece bill, it begins on page 3, section 2, of the Reece bill, which reads this way:

Any person, partnership, or corporation who violates an order of the Commission—

Mr. REECE. If it does not interrupt the witness, I want before you leave that—

Mr. MONTAGUE. Of course, you are interrupting the witness, but if you wish to, I am powerless. When you preface your statement "I do not want to interrupt the witness," and then take so long, I will have to tell you that you are interrupting the witness.

Mr. REECE. That is a courteous way I have of saying that I wish to interrupt you. You refer to the Commission having certain jurisdiction over advertising and reaching out possibly to labeling under section 5—

Mr. MONTAGUE. Did you say reaching out?

Mr. REECE. Of the act.

Mr. MONTAGUE. You say "reaching out"—there is no reaching out about something they have done from the beginning, and which the Supreme Court has held that they could do and should do.

Mr. O'HARA. Mr. Chairman; I ask that my colleague, my distinguished friend from Tennessee, be permitted to finish his question. And I think it is the chairman's responsibility, also, to exercise a little control over the witness, if I may say so now.

Mr. SADOWSKI. We have had over an hour and I have wanted this witness to complete his statement, and that we ask questions after the statement was completed, so as to finish these hearings. Otherwise this thing will continue forever.

Mr. O'HARA. Are the members of the committee not to be permitted to ask any questions?

Mr. SADOWSKI. Plenty of questions have been asked; and in fact, so many, that it is prolonging the hearings.

Ask this question and let us proceed.

Mr. REECE. Let me propound a question and see if it is a reasonable one.

Does H. R. 2390 take away from the Commission any authority or jurisdiction which it has under section 5 of the act to which you refer as having given it certain jurisdiction?

Mr. MONTAGUE. If it bears the interpretation which you said it did in your statement, it does, and that is what Administrator McNutt said when he criticized it, because it did. If what you have put in here in your sections 4 and 19 have any meaning at all, they can only mean that they take away jurisdiction which the Commission has under section 5 as it has stood from 1914 to 1938 and as it has been continued since 1938.

May I continue?

Mr. SADOWSKI. Yes: you may continue.

Mr. MONTAGUE. Turning now to section 2 of the Reece bill, I will read:

Any person, partnership, or corporation who violates an order of the Commission to cease and desist after it has become final, and while such order is in

effect, shall forfeit and pay to the United States a civil penalty of not more than \$1,000 for each violation, not to exceed the sum of \$10,000 in the aggregate, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

That is not in the food, drug, and cosmetics additions to the Federal Trade Commission law. That is an amendment of old section 5 of the Federal Trade Commission law.

Section 5 of the Federal Trade Commission law from 1914 to the present time has had the same penalty which occurs in the case of the antitrust laws, namely, \$5,000 for each violation which may be proved by the United States, but bear in mind what a violation of section 5 of the Federal Trade Commission Act is. If you violate a section of the Sherman Act you go to trial, and when found guilty you can be fined, and you can be fined not exceeding \$5,000 for each violation, but what is a violation under section 5 of the Federal Trade Commission Act? This is the procedure:

When the Commission believes that there is a probability that there has been, or is of the opinion, that is the phrase, that there has been a violation of the Federal Trade Commission law, it notifies the defendant. The defendant is then served with a complaint. He is given the opportunity of a trial. And these trials, by reason of delays, do not finally culminate until they get through the testimony, taking 2 or 3 years after the issue, with delays also at the request of the respondent. I have yet to find an instance in my own experience with the Commission, when they were ready and I was not ready, that they have refused to honor my requests for an adjournment. Any respondent is generally able to string along the time up to which there can be an order against him for 2 or 3 and sometimes 4 years, and when there is an order against him, by the Federal Trade Commission, after a full trial, the respondent then has the right, before any possibility of any fine or any penalty at all, to go before the circuit court of appeals and get a review there. And if the respondent has any lawyer who is fertile in excuses, as most of us are, he can delay that generally for 2 years more, so that meanwhile the respondent, in a Federal Trade Commission case, generally has, or can have, 3, 4, even 5 years of continuing the practice complained of before there can be any circuit court of appeals affirmance, because then, and then only, does the \$5,000 penalty of the present law apply.

That is a pretty decent provision for respondents in the present law. It is a pretty fortunate provision for them. It was because of that provision that Mr. Hoge advised the Proprietary Association in 1938 to get out from the Food and Drug Administration and get over into the Federal Trade Commission. But now they want, with respect to all proceedings, not only as to the food and drugs but all other commodities, to have the Reece bill, cut the penalty down, so that the maximum for any aggregate of violation shall never be more than \$10,000, and the maximum for one violation shall only be \$1,000. I respectfully suggest that that change is merely an effort to give a cheap license to a respondent to continue to violate the law because he can keep it going by litigation before the Commission, and before the circuit court of appeals, for 3 and 4 and 5 years, and thereafter he will be hooked for only \$1,000, or if he violates as long as he wants and repeatedly as wants, he can never be hooked for more than \$10,000.

I do not see any possible excuse for that when you consider the leniency at the present time of the Federal Trade Commission procedure.

Coming now to something which has been very much discussed by my predecessors here; that is, the question of preponderance of evidence.

The question can best be taken up—I can shorten things a good deal by just quoting, just a few, a very few, remarks which were made by some of the lawyers who have been here before, and indicating why I differ with them.

I can shorten what I otherwise would have to say.

On page 39 of the stenographer's minutes of the testimony of Mr. Digges occurs this statement. He is referring to the preponderance of the evidence and the present substantial evidence rule. It is unnecessary at this stage to tell which is which because it has been very much discussed here.

Referring to the present substantial evidence rule, Mr. Digges says that it—

places an unreasonable burden upon the trial attorney for respondent and consequently upon his client who must pay the bill. It is our mature judgment that the rule of proof in the Federal Trade Commission cases should be exactly the same as that which prevails in every civil court in the United States; that is judgment upon a fair preponderance of the evidence.

That is quite an astounding statement, or misstatement, I should say, to be made by a practicing lawyer because ever since 1791 the seventh amendment of the Constitution of the United States has required that—

In suits at common law, when the value in controversy shall exceed \$20, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of the common law—

Which is in the substantial evidence rule. That has been the rule in respect to every case on the civil side in any Federal court since 1790, and if Mr. Digges says that with that rule it is impossible, or, as he says here—

an unreasonable burden upon the trial attorney for respondent and consequently upon his client who must pay the bill—

then that accusation runs to everybody who ever tries a case or has a case on the civil side in any Federal court since 1791.

Mr. REECE. At the risk of appearing boresome, is not there a distinction between the method by which a Federal court in the first instance conducts a jury trial, where the jury hears the evidence, sees the witnesses, all under the direction of the court itself, and in the Federal Trade Commission, where the testimony is taken by an examiner and the record, becoming very voluminous, as the witnesses for the Federal Trade Commission have said on other occasions, and as Mr. Wooden said the other day, comes to the Commission, in a measure as an appellate agency, by way of briefs and arguments by the attorneys. Is not there a distinction in those two cases? Because the Federal Trade Commission sits, in a measure, as an appellate agency without seeing the witnesses or hearing the testimony, nor reading the

whole record except as presented to the Commission by way of briefs and arguments.

Mr. MONTAGUE. Have you finished your statement? If you will wait until I have gotten along, you will find that I will discuss that very conclusively. Is there anything more before I go on?

Going on, then, with what Mr. Digges says—I am reading from page 40 of the stenographic minutes of Mr. Digges' testimony:

A conscientious attorney whose client has been cited before the Federal Trade Commission must make such an exhaustive study of his case prior to the trial that he is prepared to break every Government witness on cross-examination; otherwise he must assume that he will lose his case.

That is absolutely an incorrect statement, as anyone knows who has ever tried a civil case. You do not necessarily have to break down every witness. You may, in some cases, have to break down some witnesses, but that is what you have to do in any trial.

The point I want to emphasize is that since 1791, in respect to every case on the civil side of every Federal court, the substantial-evidence rule has been the rule.

As I stated when I was qualifying myself at the beginning, I was down here in 1914 when this Federal Trade Commission bill was being discussed, and it was attacked from practically every angle excepting that, and there was nobody, so far as I can recall—nobody in the Senate or the House—who questioned the propriety of the present substantial-evidence rule. That was because all of them, unlike Mr. Digges apparently had had experience in civil trials and knew that the triers of the fact ordinarily should not be disturbed. The suggestion that you have to break down every witness just is not so.

If Mr. Digges will go in and behave just as he does in a civil trial in the Federal court, Mr. Digges will get along all right; but, apparently, he is unaware of the fact that that is the practice.

Going on with Mr. Digges—I am reading at the foot of page 41 of the stenographic minutes:

Another difficulty which a trial attorney has in his cases before the Commission is that he finds little of value to guide him in prior decisions by that body. As is generally known, the Commission really very rarely renders an opinion to accompany its decision—

and then Mr. Digges goes on to indicate that the Commission decides one case one way and another case another way, so that there is not anything like stare decisis.

There are not very many cases in which the Commission has issued what it has entitled as "opinions," and generally those have been only when there were some differences between the Commissioners, but I asked one of the young men in my office to check over the cases in three or four volumes of the Federal Trade Commission reports to find cases in which the findings of fact were of sufficient length to indicate the arguments pro and con, to indicate the weight of the evidence, and to indicate the theory of law under which the case was decided. He provided me with a list of 150 cases, after having worked on it for just 3 hours. I checked them up and I was able to find at least 30 or 40 more.

If Mr. Digges cannot tell by reading the findings of fact in any case of any complexity before the Federal Trade Commission what the reasons are, what the discussion of the evidence was, what the applica-

tion of the law is, why, he is simply not reading the reports after they come out.

It is part of my business to read those things.

Mr. SADOWSKI. You have not completed your statement?

Mr. MONTAGUE. Not a bit, but I am perfectly willing, if you want, to run over until tomorrow. I will use up until 12 o'clock.

Mr. REECE. If, in connection with what you are now saying, I would like to have your interpretation of the significance of this statement by Judge Groner, former chief justice of the circuit court of appeals:

Judicial review of administrative decisions might be expanded to include a review of the findings in the light of the weight of evidence, just as a trial judge may set aside a jury's verdict on this ground.

I shall just read that one sentence from an extended letter which he wrote Attorney General Jackson.

What do you think is disturbing Judge Groner there?

Mr. MONTAGUE. You are asking me about something utterly different from the point I am talking about. You must be thinking of something that is of far more importance than what I was saying: because if you had paid attention to what I was reading you would see I was just questioning the statement made by Mr. Digges, that usually there were no opinions by the Commission. It wasn't anything about the weight of evidence at all. Mr. Digges says there are no opinions.

Let me read it again, because you surely were thinking of what you were going to ask me next, and in no way of what I was reading here.

Here is what Mr. Digges said:

Another difficulty which a trial attorney has in his cases before the Commission is that he finds little of value to guide him in prior decisions by that body. As is generally known, the Commission really very rarely renders an opinion to accompany its decisions.

Mr. Digges is not talking about weight of evidence or anything else of that sort.

Whether the Commission does or does not render opinions is the question here, and I say that while they do not label them "opinions," they put in findings of fact which sometimes run to 100 pages, in which they enumerate all of the facts they have weighed, and any lawyer who has any intelligence, or any law student who can read lawbooks, can read those and find out the reasons why they arrived at it.

Having stated that they have no opinions, Mr. Digges then jumps to the conclusion there is no stare decisis. Well, stare decisis does not preclude the possibility that when a decision is made by a court it may possibly not be followed if the court itself changes its view. That happens very, very seldom, but Mr. Digges' suggestion that there are no such things as opinions by the Commission or that the Commission is not bound by what it has decided before or that it does not attempt to follow what is decided before, is entirely false, and any lawyer coming before you and making that statement just simply has not read the reports of the Federal Trade Commission. And if you will read them you will find that some of them are tremendously long.

I was obliged in that address, which I told you I had made in January before the section of the food, drug, and cosmetic section of the New York State Bar Association, to discuss what were the decisions

of the Federal Trade Commission on the subject of justifying differentials in price. I was not able to be there myself, but the young man who had to read it for me read quotations from the Standard Oil Co. of Indiana decision rendered by the Commission last October, which were so lengthy that he just had to cut them down, simply showing that when you are told that the Commission does not render any opinions, it means that the lawyer has not read the findings, because that is the place where they put them.

Mr. REECE. But, Mr. Chairman, I do not want to get Mr. Digges in a position where he is misquoted.

Did you understand him to say that the Commission did not render opinions, or did not give written opinions?

Mr. MONTAGUE. He said—I will quote again—

Mr. REECE. It was written opinions, I am quite sure.

Mr. MONTAGUE. I will read it once more. This is the third time. Let me read it to you.

Quoting at the bottom of page 41, at the top of page 42 of the stenographic minutes:

Another difficulty which a trial attorney has in his cases before the Commission is that he finds little of value to guide him in prior decisions by that body; as is generally known, the Commission really very rarely renders an opinion to accompany its decisions.

That is what he said. I say that there are findings by the Commission, which are made so voluminous and so extensive, and indicate so absolutely, with perfect clarity, the reasons why they have decided and reached the decision, that any lawyer of law can read them over and find out why they reached their decision. Because they do not label them "opinions" does not mean anything, because the same intelligence that the lawyer brings to an opinion, when it is applied to Commission's findings of fact, will tell him why they decided it. That further indicates what the reasons for the decisions are. And all of this talk about lack of opinions and stare decisis is a mare's nest, just raising a cloud of dust.

Mr. ROGERS. I would like to ask one question.

I would like to have you answer this question, Mr. Montague: Do you not think that Mr. Digges is just about as good a lawyer as the witness testifying, unless modesty forbids you to answer?

Mr. MONTAGUE. I guess you have sized it up as modesty.

But if you are trying to add sense to Mr. Digges' statement, I can assure you that his statement does not make sense.

Then on page 44, Mr. Digges said this:

An attorney for a private party has no right to assume that in his particular case before the Commission it is going to decide on the preponderance of the evidence when the courts have said it was not necessary—

Et cetera.

That is a pretty strong statement. That question has been raised in various forms here, by other lawyers. You say, let us assume that they are all just as good lawyers as I am. But they are lawyers with retainers in their pockets, and it is their business to make just as good a statement as they can, and not to state anything apart from their own business; that is, to state anything on the other side of the case. That is the only difference between those lawyers and me. I am frank to say I have had a lot more experience than

some of them, otherwise some of them would not have stuck their necks out so far.

Mr. REECE. You are not inferring that you do not accept fees for practicing?

Mr. MONTAGUE. On the contrary, I accept fees; but I have reached the age where, frankly, any more fees are more the interest of the internal revenue people than they are to me.

In a situation like this, I am perfectly willing to put in some of my own time to come down to correct some statements by lawyers which ought to be corrected and which, in any other field of the law, I am certain would be corrected by any bar association.

The suggestion is—and I have read it here—that no attorney before the Commission has any right to assume that the Commission is going to decide on the preponderance of the evidence. That absolutely is not true, and every case that Mr. Digges has had before the Commission, and every case which has ever been handled before the Commission by Mr. Hoge or by anybody else when they came to argue before the Commission, their briefs and their arguments discussed the question of the preponderance of the evidence. The Commission's counsel's briefs and arguments discussed the preponderance of the evidence. The whole argument before the Commission was as to what the preponderance of the evidence was. And that is all they were talking about. And you can go through the briefs of every one of these lawyers who has ever had a case before the Commission, and you will see that, far from going on the assumption that there was not any use of talking of the preponderance of the evidence, they talked about it all of the time.

Now, there has been a very broad statement to the effect that there is not anything in the law that requires the Federal Trade Commission to weigh the evidence before they make an order.

I would like to call your attention to some of the provisions in the law as it has stood since 1914, and then call your attention to Supreme Court decisions that came along in 1936 and 1940 and 1941, and see whether it is or is not the fact that there is any duty on the Federal Trade Commission to weigh the evidence before it arrives at its orders.

In section 5 (b) of the act, and this has been the law since 1914, that whenever the Commission shall have reason to believe that there has been any unfair method of competition, and if it shall appear to the Commission that a proceeding would be to the interest of the public, it should issue and serve a complaint and the person complained of shall have the right to appear and show cause why an order should not be entered. The testimony in any such proceeding shall be reduced to writing. And I call attention to this, particularly that if upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this act, it shall make a report in writing in which it shall state its findings as to the facts, and then issue an order.

That is very comparable to the provisions in the act under which the Secretary of Agriculture can fix rates in stockyards, whereas here the act simply says he has got to give a hearing. And the question came up in the Morgan cases which went up to the Supreme Court, the first one, *Morgan vs. United States* (298 U. S. 468) in 1936, and then in 1941, again, in 304 U. S. 1, as to what the general statement

that there should be a hearing meant should be the duty of the person who was conducting the hearing.

Chief Justice Hughes, in writing the opinion in the 304 U. S., page 19, said that this duty comprised all this—

fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature—

and that this duty must be inferred and implied and must be complied with.

Now, the language in the Federal Trade Commission law, stating that if upon such hearing the Commission shall be of the opinion that the method or the practice in question is prohibited by the act it shall make report and an order, necessarily implies, it cannot mean anything else, than that the members of the Federal Trade Commission have to weigh the evidence. And, of course, it is their duty to find out what the preponderance of the evidence is. That is the duty under which they are actually holding the hearings, and every brief and every argument which any of those lawyers ever made before the Commission was on the basis of what was the general weight of the evidence, one way or the other, and nowhere in any of those arguments, or any of those briefs, did anybody suggest, from the Commission or from anywhere else, that because there was a mere piece of evidence here and there, therefore the Commission could find this way or that way. Everybody assumed, contrary to what Mr. Digges said, that weighing the evidence was the only way in which they could decide, and applying the decisions in the Morgan cases to the very language which I have read to you from section 5 (b) of the Federal Trade Commission law as it has stood since 1914, places upon the Commission the absolute duty to find the preponderance, and if anywhere there should ever be an admission by any member of the Commission that he had not weighed the evidence, after hearing Brother Digges or after hearing Brother Hoge, and that he had not tried to find the preponderance of the evidence, it would be sufficient grounds for immediately getting a reversal, and it would also be grounds, probably, for impeaching that member of the Federal Trade Commission.

In the Morgan cases, it was disclosed that the Secretary, Mr. Wallace, had admitted that he had not read the entire record. This is far less heinous than deciding against the preponderance of the evidence, but Chief Justice Hughes and the rest of the Court sent it back, saying, of course, it was his duty to consider the whole case. Why, preponderance of the evidence, and the weighing of the preponderance of the evidence, and the decision as to whether it is or is not according to the preponderance of the evidence, is, necessarily one of the fundamental duties which, of course, the Commission must perform. And when Mr. Digges says that no one has a right to assume that it is going to decide on the preponderance of the evidence, he is simply stating what is not true.

Of course, the Commission may not decide what Brother Digges thinks is the preponderance of the evidence, or what Brother Hoge thinks is the preponderance of the evidence, but it is the Commission's duty to find the preponderance of the evidence, and that is exactly what

the Commission does, and it is what you will find the Commission is doing in every case that it has ever had.

I see, because of my interruptions, I have still about half an hour more to go, and, therefore, I am perfectly willing to stay over until tomorrow, if you will let me finish then.

You will have to admit we have had a great many interruptions.

Mr. SADOWSKI. We have the consent calendar coming up this afternoon, and we would rather sit here and have you complete your statement today.

We will refrain from interrupting until you finish the statement.

Mr. MONTAGUE. The same question comes at another point which is raised very rhetorically by Mr. Digges, page 54, where Mr. Digges asks: What did Congress intend when it enacted the Federal Trade Commission Act? Did it intend this fact-finding agency was to have the right to determine questions of fact, or did it intend that the reviewing court had the right to reweigh the whole record?

Insofar as the court looks at the whole record for legal errors, that is, of course, a fact. Insofar as Mr. Digges asks if there was any intention on the part of Congress that they should give to the reviewing court no right to reverse if there was any substantial evidence, it is conclusive that that is just what Congress did intend. I happen to know because I was here during the hearings on that act, and I have read, reread, all of the hearings relating to that act.

Congress had the precedent of the seventh amendment of the Constitution, that if there was any substantial evidence it could not be upset by the courts. And that is just what Congress put in, and what Congress intended to put in, and while every conceivable argument was made on every other part of the Federal Trade Commission Act, that part was never contested, because everybody assumed it was proper. So there can be no confusion what the intention was.

Now, I come to a few statements of Mr. Hoge. I am trying not to get too much duplication.

Mr. Hoge, on page 113, says:

There is now no assurance that issues of fact are determined by the weight of the evidence. The Commission may say that when it decides a case it weighs the evidence and decides on the basis of the preponderance of the evidence * * * there is nothing in this act as it now stands which compels the Commission to decide the case in the first instance by the preponderance of the evidence.

I contend that the phraseology which I have read from section 5 (b) of the Federal Trade Commission Act, plus the Morgan decisions which were rendered in 1936 and 1941 by the Supreme Court, absolutely make it the duty of the Commission to decide according to the preponderance of the evidence. But that is not the test of the reviewing court.

I am going to come to the reviewing court later, because I can see that is just what Mr. Reece is trying to ask me.

I am going to tell you why, too. And quoting Mr. Hoge once more, I will then come right to the answer, Mr. Reece, because I am getting to be almost a mind reader—

Mr. REECE. Get around to Judge Martin's opinion in the Segal case.

Mr. MONTAGUE. Mr. Hoge said, at the foot of page 114—which, of course, is contradicted by section 5 (b) of the law, and by the Morgan decisions that I have read—

The Commission says that it applies the preponderance rule, but I say to you that there is nothing in the act which requires it and no way in which the respondent can compel it.

If any Commissioner ever made an admission that he had ever departed from the preponderance rule, you could get him impeached and get the Commission's ruling set aside.

Mr. Hoge quotes from the statement of Judge Martin, which is contained in the American Bar Association Journal of December, 1945. It is just too bad that Mr. Hoge should have begun quoting only from page 625 of that issue, because if he had only quoted pages 614 to 624, and 629 and 643 and 644, he would have had quoted such a complete answer to everything that Mr. Hoge and Judge Martin have said about preponderance of evidence—and if I may add, with all due respect, a complete answer to everything which has been inquired by Congressman Reece, as to why a court review of the preponderance of the evidence was not put into the act—that it would not have been necessary for any one to go any farther. It is curious that Mr. Hoge should be quoting from 625, and should have omitted all these other pages, because all these other pages contain a statement as to administrative procedure which has been unanimously approved by the Administrative Law Committee of the American Bar Association, and in which it is stated what the American Bar Association, which has been discussing this question for ten years, wants to have as the proper rule for the review of cases, and they absolutely decide in favor of the substantial-evidence rule, and not the preponderance of evidence rule.

There is nothing radical about the American Bar Association. Every point which has been raised, and every question which Mr. Reece has asked me today, or ever before in these hearings, on the question of preponderance of evidence, has been threshed out in that Committee of the American Bar Association, and the final conclusion in the bill which they approved and in the bill which was approved by the House of the Delegates of the Association in their December 1945 meeting, has absolutely nothing in it in respect of a review on preponderance of evidence, but they have provisions entirely endorsing the substantial-evidence rule.

And simply to save my voice, I am going to ask leave to put in, after I will close, some statements on the preponderance of evidence rule which have been coming in recently.

(The statements referred to are as follows:)

ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES—REPORT OF THE COMMITTEE ON ADMINISTRATIVE PROCEDURE, APPOINTED BY THE ATTORNEY GENERAL, AT THE REQUEST OF THE PRESIDENT, TO INVESTIGATE THE NEED FOR PROCEDURAL REFORM IN VARIOUS ADMINISTRATIVE TRIBUNALS AND TO SUGGEST IMPROVEMENTS THEREIN

[January 22, 1941, S. Doc. No. 8, 77th Cong., 1st sess.]

APPENDIX TO STATEMENT OF ADDITIONAL VIEWS AND RECOMMENDATIONS OF MESSRS. M'FARLAND, STASON, AND VANDERBILT—A CODE OF STANDARDS OF FAIR ADMINISTRATIVE PROCEDURE (217)

* * * * *

(c) *Scope of review.*—As to the findings, conclusions, and decisions in any case, the reviewing court, regardless of the form of the review proceeding, shall

consider and decide so far as necessary to its decision and where raised by the parties, all relevant questions of: (1) constitutional right, power, privilege, or immunity; (2) the statutory authority or jurisdiction of the agency; (3) the lawfulness and adequacy of procedure; (4) findings, inferences, or conclusions of fact unsupported, upon the whole record, by substantial evidence; and (5) administrative action otherwise arbitrary or capricious: *Provided, however*, That upon such review due weight shall be accorded the experience, technical competence, specialized knowledge, and legislative policy of the agency involved as well as the discretionary authority conferred upon it (246-247).

UNIFORM ADMINISTRATIVE PROCEDURE ACT; NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, AUGUST 17-21, 1943. REPORT OF SPECIAL COMMITTEE ON UNIFORM ADMINISTRATIVE PROCEDURE ACT AND TENTATIVE DRAFT OF UNIFORM ADMINISTRATIVE PROCEDURE ACT

SPECIAL COMMITTEE ON UNIFORM ADMINISTRATIVE PROCEDURE ACT

E. Blythe Stason, University of Michigan Law School, Ann Arbor, Mich., chairman; Robert T. Caldwell, Second National Bank Building, Ashland, Ky.; Frank M. Clevenger, Courthouse, Wilmington, Ohio; Franklin Corrick, State Capitol Building, Topeka, Kans.; Ralph F. Fuchs, Washington University Law School, St. Louis, Mo.; John Carlisle Pryor, Tama Building, Burlington, Iowa; Fred B. Wood, 995 Market Street, San Francisco, Calif.; John H. Voorhees, Bailey-Glidden Building, Sioux Falls, S. Dak.; chairman, Uniform Civil Procedure Acts Section (2).

* * * * *

SEC. 23. Scope of review: The review shall be conducted by the court without a jury and shall be confined to the record, except that in cases of alleged irregularities in procedure before the agency, testimony thereon may be taken in the court. The court may affirm the decision of the agency, or may reverse or modify it if the substantial rights of the appellant have been prejudiced as a result of the administrative findings, inferences, conclusions or decisions being:

- (1) contrary to constitutional rights or privileges; or
- (2) in excess of the statutory authority or jurisdiction of the agency, or affected by other error of law; or
- (3) made or promulgated upon unlawful procedure; or
- (4) unsupported by substantial evidence in view of the entire record as submitted; or
- (5) arbitrary or capricious.

Upon such review due weight shall be accorded the experience, technical competence, and specialized knowledge of the agency involved, as well as discretionary authority conferred upon it.

NOTE.—The above section is one of the most important in the act. The section has been adapted from the bill submitted by the minority of the Attorney General's Committee on Administrative Procedure. (See sec. 311 (c) of S. 674.) The Attorney General's Committee gave thorough and extensive consideration to the problems of judicial review, and its conclusions are expressed in chapter VI (pp. 75-95) of its final report. Although the majority of the Committee decided against any recommendation for "general legislation for all agencies and all determinations alike," the minority felt that general definitive and clarifying legislation in the field was desirable. Their proposal (S. 674) contains a carefully considered and well-formulated plan for that purpose.

The crux of any plan for judicial review of the decisions of administrative tribunals lies in the scope of review to be allowed. During the past two or three decades a heated controversy has centered around this problem, with endless hours of discussion and volumes of written material. Almost every court that has had to deal concretely with the problem has vacillated in the course of time from one pole to the other. The full range of review extends from a complete trial de novo on the one hand to review limited to controverted questions of law on the other. The uniform act adopts the position of allowing full review of controverted questions of law, but limited review of questions of fact, with power to reverse only if there is no substantial evidence to support the decision of the agency. It may be stated with considerable assurance that this standard of review approximates the norm in state practice throughout the country. Necessarily, however, there will be found a considerable number of deviations from the norm.

In order to test the language of the section it would be desirable to study in detail the statutory provisions and the cases on judicial review in many different states. It has not been possible to do this in a thorough manner, but many cases and many statutes have been examined, and the numerous secondary sources have been thoroughly explored. On the basis of this survey it is reasonable to conclude that the provisions of the Uniform Act would fit satisfactorily in almost all situations and would serve materially to clarify and strengthen the present law.

In the Benjamin report the New York practice is carefully analyzed and described. (See part V, Judicial Review.) Commissioner Benjamin examines the cases under Sec. 1296 of the Civil Practice Act, under section 199 of the Tax Law, and under the workmen's compensation law. Although the statutory language governing review differs in each case, the author concludes on the basis of the New York decisions that the "substantial evidence" rule prevails in each instance so far as fact determinations are concerned. Moreover, he concludes, "The substantial evidence rule represents what is, as a matter of policy, the desirable scope of judicial review of quasi judicial determinations of fact" (19-21).

MODEL STATE ADMINISTRATIVE PROCEDURE ACT. PREPARED AND APPROVED BY THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, APPROVED SEPTEMBER 9, 1944; SPECIAL EDITION PREPARED FOR MEETING OF AMERICAN BAR ASSOCIATION SEPTEMBER 1944

(7) The court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional provisions; or
- (b) in excess of the statutory authority or jurisdiction of the agency; or
- (c) made upon unlawful procedure; or
- (d) affected by other error of law; or
- (e) unsupported by competent, material, and substantial evidence in view of the entire record as submitted; or
- (f) arbitrary or capricious (7-8).

AMERICAN BAR ASSOCIATION: SPECIAL COMMITTEE ON ADMINISTRATIVE LAW. LEGISLATIVE PROPOSAL ON FEDERAL ADMINISTRATIVE PROCEDURE, 1944

(f) Scope of review: With reference to any action or the application, threatened application, or terms of any rule or order and notwithstanding the form of the proceeding or whether brought by private parties for review or by public officers or others for enforcement, the reviewing court shall consider and decide, so far as necessary to its decision and where raised by the parties, all relevant questions of law arising upon the whole record or such parts thereof as may be cited by any of the parties. Upon such review, the court shall hold unlawful such act or set aside such application, rule, order, or any administrative finding or conclusion made, sanction or requirement imposed, or permission or benefit withheld to the extent that it finds them (1) arbitrary or capricious; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory authority, jurisdiction, or limitations or short of statutory right, grant, privilege, or benefit; (4) made or issued without due observance of procedures required by law; (5) unsupported by competent, material, and substantial evidence, upon the whole record as reviewed by the court, in any case in which the action, rule, or order is required by statute to be taken, made, or issued after administrative hearing, or (6) unwarranted by the facts to the extent that the facts in any case are subject to trial *de novo* by the reviewing court. (21)

* * * * *

Comment on subsection (f) of section 9: A restatement of the scope of review, as set forth in subsection (f), is obviously necessary lest the proposed statute be taken as limiting judicial review. "The objections to judicial review have been generally not to its availability but to its scope" (final report, Attorney

General's Committee, p. 80). The subsection does not attempt to expand the scope of judicial review, but at the same time care must be taken not to reduce it directly or by implication. Nor is it possible to specify all instances in which judicial review may operate. Subsection (f), therefore, seeks merely to restate the several categories of questions of law subject to judicial review. Each category has been recognized (see final report, Attorney General's Committee, pp. 87 et seq.). The several categories, constantly repeated by courts in the course of judicial decisions or opinions, were first established by the Supreme Court as the minimum requisite under the Constitution (*Interstate Commerce Commission v. Illinois Cent. R. Co.*, 215 U. S. 452, 470 (1910); *Interstate Commerce Commission v. Union Pac. R. Co.*, 222 U. S. 541, 547 (1912)) and have also been carried into State practice in part at least as the result of the identical due process clauses of the Fourteenth Amendment, applicable to the States, and the fifth amendment, applicable to the Federal Government (*New York & Queens Gas Co v. McCall*, 245 U. S. 345, 348 (1917)).

A further words of explanation may, perhaps, be required as to the language of the fifth category (administrative action unlawful if unsupported by competent, material and substantial evidence, upon the whole record as reviewed by the court, where by statute an administrative hearing is required). First, the words "upon the whole record" are designed simply to assure that the hearing—if one is required by statute—is truly a hearing. If agencies may look only to part of the record of a statutory hearing, and ignore uncontroverted and uncontrovertible evidence, then obviously, the hearing is a mere sham, the parties are put to a needless expense in participating, and judicial review is nothing more than a form. The language does not, and is not intended to, deprive administrative agencies of authority to judge of the credibility of evidence or to appraise conflicting evidence. Secondly, the fifth category necessarily limits the substantial evidence rule to cases in which Congress has required an administrative hearing upon which the administrative record may be made. The sixth category expresses the correlative situation in which Congress has not provided by statute for an administrative hearing and consequently any relevant facts must be presented de novo to original courts of review (see *Kessler v. Strecker*, 307 U. S. 22, 35 (1939)). It should be noted that the sixth category, in accordance with the established rule, would permit trial de novo to establish the relevant facts as to the applicability of any rule and as to the propriety of adjudications where there is no statutory administrative hearing, but it does not attempt to state in what other instances evidence may be presented originally to courts of review since the latter subject is one which the courts themselves have not fully settled (see final report, Attorney General's Committee, p. 87; *Baltimore & O. R. Co. v. United States*, 298 U. S. 38, 368, 372 (1936); *St. Joseph Stock Yards Co. v. United States*, 298 U. S. 468, 486 (1936); *Morgan v. United States*, 304 U. S. 1, 14 (1938); *United States v. Idaho*, 298 U. S. 105, 109 (1926)) (39-40).

H. R. 1203 (SUMNERS, JANUARY 8, 1945). A BILL TO IMPROVE THE ADMINISTRATION OF JUSTICE BY PRESCRIBING FAIR ADMINISTRATIVE PROCEDURE

(e) SCOPE OF REVIEW: So far as necessary to decision and where presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) direct or compel agency action unlawfully withheld or unreasonably delayed and (B) hold unlawful and set aside agency action found (1) arbitrary, capricious, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without due observance of procedure required by law; (5) unsupported by competent, material, and substantial evidence upon the whole agency record as reviewed by the court in any case subject to the requirements of sections 7 and 8; or (6) unwarranted by the facts to the extent that the facts in any case are subject to trial de novo by the reviewing court. The relevant facts shall be tried and determined de novo by the original court of review in all cases in which adjudications are not required by statute to be made upon agency hearing (17-18).

H. R. 4941 (SUMNERS, DECEMBER 10, 1945), A BILL TO IMPROVE THE ADMINISTRATION OF JUSTICE BY PRESCRIBING FAIR ADMINISTRATIVE PROCEDURE

SCOPE OF REVIEW: So far as necessary to decision and where presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of any agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by the parties, and due account shall be taken of the rule of prejudicial error (18-19).

The Court of Appeals of the State of New York now evinces reluctance to review on the facts the judgments of lower courts and the findings and orders of administrative agencies, even when the New York statutes expressly authorize the court of appeals to do so.

People ex rel. New York & Queens Gas Company v. McCall (219 N. Y. 84, Oct. 3, 1916, affirmed 245 U. S. 345).

Matter of Elimination of Grade Crossings of New York Central Railroad Co. (255 N. Y. 320, Jan. 6, 1931).

Matter of P. S. I. Transp. Co. v. P. S. Com. (258 N. Y. 455, 459, 461, March 3, 1932).

Matter of Niagara Falls Power Co. v. Water Power and Control Commission (267 N. Y. 265, 278, April 23, 1935).

People ex rel. Consol. Water Co. v. Maltbie (275 N. Y. 357, 366, July 13, 1937).

Matter of City of Syracuse v. Gibbs (283 N. Y. 275, 290, July 24, 1940).

Matter of Calder v. Graves (261 A. D. 90, Jan. 8, 1941; affirmed without opinion, 286 N. Y. 643).

Acrated Products Co. v. Godfrey (290 N. Y. 92, 99, March 4, 1943).

Harrington v. Harrington (290 N. Y. 126, March 11, 1943).

Drivas v. Lekas (292 N. Y. 204, 203, March 10, 1944).

Henry Cohen, Reluctance of the N. Y. Court of Appeals to Review Facts (44 Columbia Law Rev., 352, May 1944).

Robert M. Benjamin, Commissioner under section 8 of Executive Law, Report to Gov. H. H. Lehman on Administrative Adjudication in the State of New York, March 1942; 181-194, 328-368.

Commissioner Benjamin in his report (p. 1) quotes Governor Lehman's January 1939 annual message to the legislature, as follows: "In launching extensive social and labor programs, we have resorted more and more to quasi-judicial determination by administrative agencies. At the last election the people rejected a proposal for the judicial review of the facts as well as of the law of virtually all decisions of administrative officers and agencies.

ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES. REPORT OF THE COMMITTEE ON ADMINISTRATIVE PROCEDURE, APPOINTED BY THE ATTORNEY GENERAL, AT THE REQUEST OF THE PRESIDENT, TO INVESTIGATE THE NEED FOR PROCEDURAL REFORM IN VARIOUS ADMINISTRATIVE TRIBUNALS AND TO SUGGEST IMPROVEMENTS THEREIN. JANUARY 22, 1941, SENATE DOCUMENT NO. 8, SEVENTY-SEVENTH CONGRESS, FIRST SESSION

ADDITIONAL VIEWS AND RECOMMENDATIONS OF MESSRS. M'FARLAND, STASON, AND VANDERBILT (203)

* * * * *

Footnote, page 210: "The Communications Act of 1934 provides with respect to permits and licenses 'that the review by the court shall be limited to questions

of law and that findings of fact by the Commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the Commission are arbitrary or capricious.' The Federal Trade Commission Act provides that 'the findings of the Commission as to the facts, if supported by evidence, shall be conclusive.' The National Labor Relations Act contains a similar provision. The Securities and Exchange Act provides that conclusiveness shall attach to the findings of the Commission as to the facts if they are 'supported by substantial evidence.' Similar phraseology is found in the case of the Federal Alcohol Administration Act, the Federal Power Act, the Fair Labor Standards Act, and the Bituminous Coal Act. The Interstate Commerce Act provides as to reparations cases that the findings of the Commission shall be 'prima facie evidence of the matters recited therein. Under the Walsh-Healey Act the findings of the Secretary of Labor are conclusive 'if supported by the preponderance of the evidence.' Under the Commodities Exchange Act, orders of the Commission reviewing or revoking designations of contract markets must be supported 'by the weight of the evidence.' "

Mr. MONTAGUE. First of all, Dean Stason, with Arthur Vanderbilt, dean of the New York University Law School, for whom Mr. Reece and I have great respect, accepted the substantial-evidence rule and not the preponderance-of-evidence rule in 1941.

Mr. REECE. Mr. Chairman, I appeal to the patience of the Chair for permission to ask you one more question.

Mr. MONTAGUE. It may mean I will have to come back tomorrow, or you will have to sit beyond 12 o'clock.

Mr. REECE. It is on that subject to which you refer.

Has the Commission, in your knowledge, had any findings which have been overruled by the courts, except in those cases where it stated that there was no evidence to support the findings, such as the Carlay case, in which it said there is no evidence in this record to support a finding, and in the Dearborn case, in which it said, admittedly, there is no direct proof in support of this finding.

What I have in mind in asking the question is, do the decisions of the courts in these appeal cases indicate that the Commission had been overruled except in the cases where it was held that there was no evidence to support the finding?

Mr. MONTAGUE. The Commission was overruled many times on questions of law.

Mr. REECE. You can extend your remarks to make reference to that, if you so desire.

Mr. MONTAGUE. It is very frequently overruled on questions of law, but the full effect of the substantial-evidence rule—

Mr. REECE. In order to clarify the question, I mean overruled on questions of fact, and I am not referring to overruled on questions of law.

Mr. MONTAGUE. When I say substantial, I mean more than a scintilla. The repeated decisions of the Supreme Court of the United States on that subject are to this effect, it has to be substantial, but if there is substantial evidence supporting a finding, ever since 1791, it cannot be overturned in the case of a civil suit on the Federal side, and the same rule applies in the cases before the Federal Trade Commission. That is absolutely true. No question about that whatsoever.

And I emphasize that the American Bar Association, after studying this question for 10 years, through its administrative law committee, unanimously approved a rule identical with what I am telling you, the substantial-evidence rule. That is all they are asking for. It is all

that is asked for in the McCarran-Sumners bill. It is all that has been asked for by bills which have been supported by Dean Stason.

With reference to Dean Stason, it is a little difficult to harmonize some of the things previously said by him and with your permission, I will put in a bill which he endorsed, in fact, he drafted it, he being chairman of the Committee on Uniform Administrative Procedure for the States, in which he not only endorsed the substantial-evidence rule, and did not have any approval at all for the preponderance of the evidence rule for review, but also stated why, and then another redraft of that bill in which he retained the substantial-evidence rule.

And I have here an analysis of the successive proposals that have come up in the American Bar Association, so that everything which has been suggested by Congressman Reece, everything that you are suggesting, is simply old straw that has been threshed over by a great many people who are just as strongly Republican as you and I are, and do not have any more use for Democrats, the New Deal, or anything else, than you and I do but have all finally come back to the point that this substantial-evidence rule is all right as it stands. And insofar as you are now trying to overturn this, and to put in the preponderance-of-evidence rule, you are putting up something which I tried just as hard as anybody else in the American Bar Association, 10 years ago, to get over, but I became converted, and so have all of the rest of them become converted, and they have approved this substantial-evidence rule, which is against the proposition that you are putting up very manfully and persistently, but which, as I say, is absolutely just as ineffective if you were to go out and argue that the automobile, as you see it in the street, today ought to go back to the electric buggy automobile of the 1900's.

This subject has been discussed by a great many minds by no means in favor of administrative tribunals or agencies or anything else like them, and the final conclusion they have all come down to is that the preponderance-of-evidence rule is not the kind of thing to have, and that the substantial evidence is what they have got to have, and I will put that in.

There is just one more thing, and I will curtail my remarks, and then I will finish.

It occurred to me Saturday just before coming down here that I might be able to find a letter which might be of a little interest to this committee. I have done a great deal of writing on this subject, and curiously enough, a good deal of my writing has been in Dean Stason's own Michigan Law Review, and as I have shown you here, it is pretty difficult to reconcile the kind of bills that Dean Stason has been approving with some of the things he says here.

I do not pretend to know what the answer is, but I will put it in some of his writings, and let you try to decipher it.

He has been advocating this substantial-evidence rule, in spite of the contrary impressions you may have gotten from his testimony here.

I happened to discuss this subject with Chief Justice Stone, whom I knew years before he ever came to Washington, and I sent him an article which I had published in the February, 1942 issue of the Michigan Law Review, Dean Stason's own law school, in which I discussed this Attorney General's Committee's report, showing how Dean Stason there supported the substantial-evidence rule, and then I called Chief Justice Stone's attention to a commissioner who had been ap-

pointed by Governor Lehman in New York to look into the whole question of the administrative agencies in the State of New York, and what should be the scope of judicial review.

We had in New York, in 1938, a constitutional convention. Those were the years when I was all for preponderance of evidence, Congressman Reece, just like you, and on the floor of that constitutional convention, there was a fight to put into the constitution the right of judicial review by a preponderance of the evidence. That fight was carried on by Surrogate James A. Foley, who recently died, and whom we all knew in New York, and greatly respected. While he was in Tammany and I am a Republican, a Union League Club member, I worked all that summer getting material, just as I suppose Jimmie Hoge is giving material to you, Congressman Reece, trying to battle for this preponderance of evidence rule. And what we put in, trying to get that thing over, got this far in the constitutional convention, that Judge Foley got the constitutional convention to agree that the proposal as to whether there should be or should not be that kind of review should be submitted to a popular vote.

Although we have in New York judicial service on the facts of all Supreme Court decisions in the Appellate Division, so that people in New York are far more familiar with the preponderance of evidence rule than are other people of other States, we were overwhelmingly licked in the referendum in the fall of 1938.

The people of the State of New York rejected the suggestion that there should be any review of the administrative decisions by a preponderance of the evidence. Immediately after that, Governor Lehman appointed a Commissioner under what we call the Moreland Act to go into the whole subject of the administrative agencies in New York, and eventually, the Commissioner came through with a report, and I took occasion to write to the Chief Justice and call his attention to it.

The Chief Justice previously had seen the article which I had written in the February 1942 Michigan Law Review, and I got back from him this letter. It belongs in a collection of autograph letters that I have been collecting for a number of years, comprising judges and statesmen for about 300 years, and the whole collection, I hope, will eventually go to the New York Library, but this letter will be of interest to you. It is on the letterhead of the Supreme Court of the United States, Chambers of the Chief Justice, October 19, 1942:

DEAR MR. MONTAGUE: Thank you for your letter bringing to my attention Commissioner Robert M. Benjamin's report on administrative adjudication in the State of New York.

I have not seen the report but I shall get hold of it at the first opportunity and I shall look forward to seeing your review of it.

I did later publish that review, which appears in the February 1943 Michigan Law Review.

As I say, my relations with Dean Stason are very friendly, and I have a great admiration for him.

Going on with the letter of Chief Justice Stone:

Making the administrative agency function as it should is the big problem of lawyers, and I am glad to see more attention being directed to that problem and less to finding ways and means of strangling such agencies.

Yours sincerely,

HARLAN F. STONE.

Mr. RABIN. You know of no provision of law that prohibits an attorney from taking a retainer for appearing before a committee like this?

Mr. MONTAGUE. Not at all. I merely want to say they are good attorneys. Of course, they have the right. In the old days I used to do the same thing.

Mr. RABIN. It does not follow, merely because a man has a retainer in his pocket, that he is trying to mislead this committee, does it?

Mr. MONTAGUE. I do not think he is necessarily trying to deceive the committee, but I do not think he conceives it his duty to bring out things which are contrary to the things which his clients want to put into the statute book.

Mr. RABIN. Is that your standard when you practice law; is that the standard you adopt when you practice law?

Mr. MONTAGUE. I am frank to say, I must say it is pretty difficult, with all of my friendship and all of my admiration of these lawyers, to understand why they can come down here and say to this committee that the Federal Trade Commission does not decide or try to decide according to preponderance of evidence. It is just impossible for me to conceive anybody ever saying that, because those very men, when they argue a case before the Commission discuss preponderance of evidence.

Mr. RABIN. I address my questions not particularly with respect to what these witnesses have said, but I address my questions as to the standard that attorneys should adopt.

I want to know whether you consider it necessary for an attorney to conceal part of the truth or the whole truth merely because he has a retainer in his pocket? I am talking not about what these attorneys have done, but the general standard.

Mr. MONTAGUE. I cannot conceive of how a lawyer can come before you and make those statements.

Mr. RABIN. I am not talking about these lawyers. I am talking about the general standard.

Mr. MONTAGUE. I will say that the general standard—let me put it this way: If any of those lawyers in New York City, before anyone in any public hearing, had ever intimated that any judge in New York County, or any triers of the fact in New York County, did not search for the preponderance of the evidence, but merely tried to find such shreds that they could to hang a decision on, because they could slip by with it, two things would immediately happen:

First, the newspapers would comment on that statement.

Next, the Bar Association would get busy.

The Bar Association would immediately come to the defense against that kind of a charge made against those judges, and would then take disciplinary action against those statements being made by the lawyers.

For some reason or other, these gentlemen seem to think that they can make charges of that serious character against members of the Federal Trade Commission, which they would not dare or even think of making in respect to any judge.

That may indicate an answer to your question.

I do not think those are good standards, but I do not enforce my standards against them.

Mr. RABIN. You did not answer my question, because I specifically excluded from my question the specific references made by these lawyers who came before us.

I would like to know what you consider the standard to be, and whether you consider that it must necessarily follow that because a lawyer has a retainer in his pocket, that he must, or should, or may make a misstatement to this committee or to conceal the whole truth or conceal part of the truth.

Does that necessarily follow?

Mr. MONTAGUE. I will say it is an excuse. I do not say it justifies him. I will say this, in my day I never did it, but these gentlemen, I just cannot reconcile their behavior with behavior which is perfectly standard behavior to be expected of any lawyer referring to any judge, and I suggest that the same standard should apply before they make a serious charge like that against the Federal Trade Commission.

Mr. RABIN. The reason I ask that question is for the benefit of the bar. I do not want anybody to think that it is the lawyer's duty, whether he represents a client before a court, or whether he represents a client before a committee of this kind, to mislead or conceal.

I do not think that is the standard—just a minute—I do not think that is the standard, and if these lawyers have done it, and incidentally, I want to say I do not agree with you that they have, but if these lawyers have done it, then I do not think that they are complying with the standard of ethics set up by lawyers generally.

Mr. MONTAGUE. I am very fearful they have violated the standards you have described.

Mr. RABIN. Coming down to this rule of the preponderance of the evidence, I just want to say that I heard Dean Stason's testimony, and I did not come to the conclusion, in spite of what has been said, that he has departed from the substantial-evidence rule.

I came to the conclusion that what he said was that he believes the substantial-evidence standard to be a good one, provided the administrators, in their work, have certain safeguards thrown around the hearings.

You and I agree that perhaps there could be certain safeguards thrown around them.

Mr. MONTAGUE. What you say will be borne out by what I shall give to the stenographer.

Mr. RABIN. Am I wrong in that construction?

Mr. MONTAGUE. I do not think so.

I have read over Dean Stason's testimony, and I have been in very frequent correspondence with him. I have done a great deal of speaking on this subject before various bar associations and Dean Found, who has been quoted here, I have been on the platform with Dean Found, and, therefore, I have in my files a very complete record of what Dean Stason has suggested, and reading that over, it is unmistakable that he does not want a departure from the substantial evidence rule, and I will take the liberty of putting those statements in.

Mr. RABIN. The conclusion arrived at in his testimony was that he was not for this bill, and only this bill—that he believed that the substantial-evidence rule to be a good one, provided there be some safeguards to be thrown around it.

Mr. MONTAGUE. This applies also to Arthur Vanderbilt. I am speaking of the minority in the Attorney General's committee that reported in 1941. While the American Bar Association's committee on administrative law was originally a long way off from that, they finally unanimously came around with the views that you cannot have this preponderance-of-evidence rule, and that you must have the substantial-evidence rule.

Mr. O'HARA. The American Bar Association committee has been studying this, has sort of changed around, like the chameleon a good deal on this question, have they not; finally, they have gotten to a point where the Attorney General wrote that he thought it was a good rule, is that not true, as a matter of fact?

Mr. MONTAGUE. It is not quite true.

The American Bar Association finally sold the Attorney General. I went over that just a year ago with Dean Pound, who is the ex-dean of the Harvard Law School, and I presume he has been the spark plug of the whole American Bar Association agitation on this subject, and he first started off on the idea of having a preponderance-of-evidence rule.

I said to Dean Pound when we were both speaking in Providence on this subject, in a forum on administrative law, I said, "Dean Pound, are you now in favor of this McCarran-Sumners bill?"

He said, "After full consideration, I am."

And I will put into the record some authorities to indicate why that thing is so. It is merely because, if you put this preponderance of evidence rule in the law, the courts just would not pay any attention to it anyway, because they cannot read over this whole thing again. They do not want it.

And the suggestion made by one of the witnesses that the courts were dissatisfied with the substantial evidence rule is all untrue.

I meet a great number of judges who know that administrative law practice before administrative bodies is my specialty. They have talked to me repeatedly about this.

I have talked with a great number of circuit court of appeals judges and other judges in New York, and there is not one who is in favor of this preponderance of evidence rule.

When they say, "We might decide it the other way," that is just what they say in respect to the jury, but that does not mean they want the power. They do not want the power. They would not exercise it if they had it.

And when I was speaking 2 months ago in New York, in this address of mine which was serially reported in the New York Law Journal, I put into it something about this which has here been discussed, and there was an editorial in the Journal about it. As Congressman Rabin well knows, the appellate division of New York has the right, as you know, to review the weight of evidence again, but the court of appeals, to discussing the appellate division's right to determine the weight of evidence, in respect to some of the administrative agencies, has refused to let the appellate division set aside the findings and the orders of those agencies, even though the appellate division wished to decide according to the weight of evidence. The court of appeals seems to say, "We will disregard that." In other words, there

is a pulling away from the preponderance of evidence rule in the State of New York.

I am going to put some deviations on this point into the record here.

They have attracted so much attention that there was recently an article in the Columbia Law Review about the reluctance of the courts to review questions of fact.

Mr. O'HARA. On that question of the reluctance of the court, with no reflection upon the courts, it is an easy way out, is it not?

Mr. MONTAGUE. That is it exactly.

Mr. O'HARA. It does not necessarily mean that substantial justice has not been done?

Mr. MONTAGUE. It merely is just like when I invite you to dinner, and you don't say, "I am tired and do not want to come," but you say, "I have another engagement"; it does not mean that you would necessarily come if you had no engagement. It is the usual thing that courts always say.

Judge Hand discussed this subject as much as 10 years ago, as to how impossible it would be, if you should make it the reviewing court's duty to review on the preponderance of the evidence these findings as they come up from the commissions and other courts.

I apologize for taking up so much of your time.

Mr. RABIN. My experience has been that the judges are glad that they do not have that right; they are glad that they do not have that right in many instances.

Mr. MONTAGUE. Enthusiastically glad.

Mr. REECE. With reference to the interpretation that has been put upon the testimony of some of the proponents who have appeared before the committee, do you feel, when an attorney appeals from the decision of the judge on the grounds that the decision is contrary to the weight of the evidence, that that is a reflection upon the court?

Mr. MONTAGUE. I can tell you that anybody who would make in respect of any judge the statements that have been made here before you, in which three times Congressman Rabin asked Mr. Hoge if the Commission did not try to decide by the preponderance of the evidence rule, and Mr. Hoge each time came back, not with the statement "yes," but with statements giving the irresistible impression, as you read that testimony, that that is just what they do not try to do, I say that charge would result in disciplinary procedure, if made by Mr. Hoge regarding any judge in New York County.

Mr. SADOWSKI. Thank you, Mr. Montague.

It has been a very fine statement.

Mr. MONTAGUE. I thank you very much for your patience.

I would like to specifically name the Commissioner whom I mentioned; that is, Commissioner Benjamin—Robert M. Benjamin who is well known. I am sure, to Congressman Rabin, and I would like to pay a tribute to him.

May I also make the suggestion, Mr. Chairman, that you ask or permit the Federal Trade Commission to put in pages 615 to 624 and 629 and 643 and 644 of the December 1945, American Bar Association Journal, because those pages summarize everything which has been done for 10 years in the Bar Association. They state the substantial evidence rule which they approve of, and it is, as I say, the law

entirely as it now stands, so far as the substantial evidence rule is concerned.

Those pages are certainly worthy of far more importance as indicating the changed view of men who have studied it, approaching it just as I first approached it, from the opposite side.

MR. SADOWSKI. The Chair will grant you permission to include those articles.

MR. MONTAGUE. You should certainly see them. They consist of the pages right next to the pages which have been read to you by Mr. Hoge and Congressman Reece from that same issue.

(Following are the pages in December 1945 American Bar Association Journal which are referred to by Mr. Montague:)

SENATE JUDICIARY COMMITTEE REPORTS ADMINISTRATIVE PROCEDURE BILL

An important step toward the accomplishment of long-needed reforms in administrative law and procedure, for which the American Bar Association and other public organizations have worked for many years, was taken on Monday, November 19, when the Senate Committee on the Judiciary reported favorably for the action of the Senate of the United States the proposed Administrative Procedure Act (S. 7) as revised.

The association's special committee on administrative law, of which Carl McFarland, of Washington, D. C., is the chairman, has approved unanimously the text so reported, as meritorious and as responsive to the declared position, and in furtherance of the policies, of the American Bar Association. Members of the Association will hail the committee's action with great satisfaction, and will study the report and the bill with keen interest.

In recommending the enactment of the measure, the Senate Committee on the Judiciary issued a comprehensive report and analysis, of which the following is a synopsis:

There is a widespread demand for legislation to settle and regulate the field of Federal administrative law and procedure. The Committee on the Judiciary is convinced that, at least in essentials, there should be some simple and standard plan of administrative procedure.

I. LEGISLATIVE HISTORY

For more than 10 years Congress has considered proposals for general statutes respecting administrative law and procedure.

In 1937 the President's Committee on Administrative Management issued its report, which the President approved, recommending the complete separation of investigative-prosecuting functions and personnel from deciding functions and personnel.

In 1938 the Senate Committee on the Judiciary held hearings on a proposal for the creation of an administrative court.

In 1939 the Walter-Logan administrative procedure bill was reported favorably to the Senate. It was passed by the Congress, but was vetoed by the President in 1940 on the ground, in part, that action should await the then imminent final report by a committee appointed in the executive branch to study the entire situation.

In December of 1938 the Attorney General had recommended the appointment of a commission to make a thorough survey and recommend improvements. The President authorized the Attorney General to appoint a committee for that purpose. It was composed of Government officials, teachers, judges, and lawyers in private practice. Its staff prepared, and in 1940-41 issued, a series of studies of the procedures of the principal administrative agencies and bureaus of the Federal Government. The Committee held executive sessions over a long period, at which the representatives of Federal agencies were heard. It also held public hearings. It then prepared and issued a voluminous final report.

Growing out of the work of the Attorney General's Committee on Administrative Procedure, several bills were introduced in 1941, and hearings were held. The international situation prompted a postponement of further consideration.

Based upon the studies and hearings in connection with prior bills, and after consultation with interested parties, S. 2030 and H. R. 5081 were introduced in

the Seventy-eighth Congress on June 21, 1944. With the opening of the present Congress, a revised and simplified bill was introduced by Senator McCarran, chairman of the Senate committee, as S. 7, and by Congressman Sumners, chairman of the House committee, as H. R. 1203.

Much discussion followed. The House Committee on the Judiciary held hearings in the latter part of June 1945. Previously, that committee and the Senate Committee on the Judiciary had requested administrative agencies to submit their views in writing. These were carefully analyzed, and in May of 1945 there was issued a Senate committee print which set forth in parallel columns the bill as introduced and a tentatively revised text. Again, interested parties in and out of Government submitted comments, orally or in writing, as to the revised text. These were analyzed by the committee's staff, and a further committee print was issued in June 1945. In four parallel columns it set forth (1) the text of the bill as introduced, (2) the text of the tentatively revised bill previously published, (3) a general explanation of provisions with references to the report of the Attorney General's Committee on Administrative Procedure and other authorities, and (4) a summary of views and suggestions received.

Thereafter, the Attorney General again designated representatives to hold further discussions with interested agencies and to secure and further correlate agency views. Private parties and private organizations also participated. Following these discussions, the Committee drafted the bill as it is now reported. The Attorney General submitted to the committees a favorable report on the bill, as elsewhere quoted.

II. APPROACH OF THE COMMITTEE

The principal problems of the Committee have been: First, to distinguish between different types of administrative operations. Second, to frame general requirements applicable to each such type of operation. Third, to set forth those requirements in clear and simple terms. Fourth, to make sure that the bill is complete enough to cover the whole field.

The Committee has avoided attempting to oversimplify the measure. It has not hesitated to state functional classifications and exceptions where those could be rested upon firm grounds. In so doing, it has been its undeviating policy to deal with types of functions as such and in no case with administrative agencies by name. Manifestly, it would be folly to assume to distinguish between "good" agencies and others.

Comparison with Walter-Logan bill

The present bill must be distinguished from the Walter-Logan bill in several essential respects. It differentiates the several types of rules. It requires no agency hearings in connection with either regulations or adjudications unless statutes already do so in particular cases, thereby preserving rights of judicial trials de novo. Where statutory hearings are otherwise provided, it fills in some of the essential requirements: and it provides for a special class of semi-independent subordinate hearing officers. It includes several types of incidental procedures. It confers numerous procedural rights. It limits administrative penalties. It contains more comprehensive provisions for judicial review for the redress of any legal wrong. And, since it is drawn entirely upon a functional basis, it contains no exemptions of agencies as such.

Comparison with Attorney General's Committee report

The present bill is more complete than the solution favored by the majority of the Attorney General's Committee, but is regarded as more definite than the minority's proposal. While it follows generally the views of good administrative practice as expressed by the whole of that Committee, it differs in several important respects. It provides that agencies may choose whether their examiners shall make the initial decision or merely recommend a decision, whereas the Attorney General's Committee made a decision by examiners mandatory. It provides some general limitations upon administrative powers and sanctions, particularly in the rigorous field of licensing, while the Attorney General's Committee did not touch upon the subject. It relies upon the independence, salary security, and tenure during good behavior of examiners within the framework of the civil service whereas the Attorney General's Committee favored short-term appointments approved by a special Office of Administrative Procedure.

III. STRUCTURE OF THE BILL

The bill as reported is not a specification of the details of administrative procedure, nor is it a codification of administrative law. It is an outline of minimum basic essentials. It is designed to afford to parties affected by administrative powers a means of knowing what their rights are and how they may be protected. By the same token, administrators are provided with a simple course to follow in making administrative determinations. The jurisdiction of the courts is clearly stated.

The bill provides for public information, administrative operation, and judicial review. The first of these is basic, because it requires agencies to take the initiative in informing the public. In stating the essentials of the different forms of administrative proceedings, the bill distinguishes carefully between the so-called legislative functions of administrative agencies (where they issue general regulations) and their judicial functions (in which they determine rights or liabilities in particular cases). In the rule making (that is, legislative) function, the bill provides that, with certain exceptions, agencies must publish notice and at least permit interested parties to submit their views in writing for agency consideration before issuing general regulations. No hearings are required by the bill unless other statutes already do so. Similarly, in adjudications (that is, the judicial function), no agency hearings are required unless statutes already do so, but in the latter case the mode of hearing and decision is prescribed. Where existing statutes require that either general regulations (called rules in the bill) or particularized adjudications (called orders in the bill) be made after agency hearing or opportunity for such hearing, then the bill spells out the minimum requirements for such hearings, states how decisions shall be made thereafter, and provides for examiners to preside at hearings and make or participate in decisions. The provisions for judicial review provide parties with a method of enforcing their rights in a proper case.

The bill is so drafted that its several sections and subordinate provisions are closely knit. The substantive provisions of the bill should be read apart from the purely formal provisions and minor functional distinctions. The definitions are important, but they do not indicate the scope of the bill since the subsequent provisions make functional distinctions and exceptions. The public-information provisions are of the broadest application because, while some functions and some operations may not lend themselves to formal procedure, all administrative operations should as a matter of policy be disclosed to the public except as secrecy may obviously be required or only internal agency "house-keeping" arrangements may be involved.

IV. ANALYSIS OF PROVISIONS

Statements in the committee report respecting each provision of the bill are designed to answer specific questions relating to language and objectives. These are omitted here, but there follows the synopsis of the bill as set forth in the committee's report.

Section 1. Title

The measure may be cited as the Administrative Procedure Act.

Section 2. Definitions

The definitions apply to the remainder of the bill.

(a) *Agency*.—The word "agency" is defined by excluding legislative, judicial, and territorial authorities and by including any other authority whether or not within or subject to review by another agency. The bill is not to be construed to repeal delegations of authority provided by law. Expressly exempted from the term "agency," except for the public-information requirements of section 3, are (1) agencies composed of representatives of parties or of organizations of parties and (2) defined war authorities including civilian authorities functioning under temporary or named statutes operative during "present hostilities."

(b) *Person and party*.—"Person" is defined to include specified forms of organizations other than agencies. "Party" is defined to include anyone named, or admitted or seeking and entitled to be admitted, as a party in any agency proceeding except that nothing in the subsection is to be construed to prevent an agency from admitting anyone as a party for limited purposes.

(c) *Rule and rule making.*—"Rule" is defined as any agency statement of general applicability designed to implement, interpret, or prescribe law, policy, organization, procedure, or practice requirements. "Rule making" means agency process for the formulation, amendment, or repeal of a rule and includes any prescription for the future of rates, wages, financial structures, etc., etc.

(d) *Order and adjudication.*—"Order" means the final disposition of any matter, other than rule making but including licensing, whether or not affirmative, negative, or declaratory in form. "Adjudication" means the agency process for the formulation of an order.

(e) *License and licensing.*—"License" is defined to include any form of required official permission such as certificate, charter, etc. "Licensing" is defined to include agency process respecting the grant, renewal, modification, denial, revocation, etc., of a license.

(f) *Sanction and relief.*—"Sanction" is defined to include any agency prohibition, withholding of relief, penalty, seizure, assessment, requirement, restriction, etc. "Relief" is defined to include any agency grant, recognition, or other beneficial action.

(g) *Agency proceeding and action.*—"Agency proceeding" is defined to mean any agency process defined in the foregoing subsections (c), (d), or (e). For the purpose of section 10 on judicial review, "agency action" is defined to include an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, and failure to act.

Section 3. Public information

From the public information provisions of section 3 there are exempted matters (1) requiring secrecy in the public interest or (2) relating solely to the internal management of an agency.

(a) *Rules.*—Every agency is required to publish in the Federal Register its (1) organization, (2) places of doing business with the public, (3) methods of rule making and adjudication including the rules of practice relating thereto, and (4) such substantive rules as it may frame for the guidance of the public. No person is in any manner to be required to resort to organization or procedure not so published.

(b) *Opinions and orders.*—Agencies are required to publish or, pursuant to rule, make available to public inspection all final opinions or orders in the adjudication of cases except those held confidential for good cause and not cited as precedents.

(c) *Public records.*—Except as statutes may require otherwise or information may be held confidential for good cause, matters of official record are to be made available to persons properly and directly concerned in accordance with rules to be issued by the agency.

Section 4. Rule making

The introductory clause exempts from all of the requirements of section 4 any rule making so far as there are included (1) military, naval, or foreign affairs functions or (2) matters relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(a) *Notice.*—General notice of proposed rule making must be published in the Federal Register and must include (1) time, place, and nature of proceedings, (2) reference to authority under which held, and (3) terms, substance, or issues involved. However, except where notice and hearing are required by some other statute, the subsection does not apply to rules other than those of substance or where the agency for good cause finds (and incorporates the finding and reasons therefor in the published rule) that notice and public procedure are impracticable, unnecessary, or contrary to the public interest.

(b) *Procedures.*—After such notice, the agency must afford interested persons an opportunity to participate in the rule making at least to the extent of submitting written data, views, or argument; and, after consideration of such presentations, the agency must incorporate in any rules adopted a concise general statement of their basis and purpose. However, where other statutes require rules to be made after hearing, the requirements of sections 7 and 8 (relating to public hearings and decisions thereon) apply in place of the provisions of this subsection.

(c) *Effective dates.*—The required publication or service of any substantive rule must be made not less than 30 days prior to its effective date except (1) as otherwise provided by the agency for good cause found and published or (2)

in the case of rules recognizing exemption or relieving restriction, interpretative rules, and statements of policy.

(d) *Petitions*.—Every agency is required to accord any interested person the right to petition for the issuance, amendment, or repeal of a rule.

Section 5. Adjudications

The various subsequent provisions of section 5 relating to adjudications apply only where the case is otherwise required by statute to be determined upon an agency hearing except that, even in that case, the following classes of operations are expressly not affected: (1) Cases subject to trial de novo in court, (2) selection or tenure of public officers other than examiners, (3) decisions resting on inspections, tests, or elections, (4) military, naval, and foreign affairs functions, (5) cases in which an agency is acting for a court, and (6) the certification of employee representatives.

(a) *Notice*.—Persons entitled to notice of an agency hearing are to be duly and timely informed of (1) the time, place, and nature of the hearing, (2) the legal authority and jurisdiction under which it is to be held, and (3) the matters of fact and law asserted. Where private persons are the moving parties, respondents must give prompt notice of issues controverted in law or fact; and in other cases the agency may require responsive pleading. In fixing the times and places for hearings the agency must give due regard to the convenience and necessity of the parties.

(b) *Procedure*.—The agency is required first to afford parties an opportunity for the settlement or adjustment of issues (where time, the nature of the proceeding, and the public interest permit) followed, to the extent that issues are not so settled, by hearing and decision under sections 7 and 8.

(c) *Separation of functions*.—Officers who preside at the taking of evidence must make the decision or recommended decision in the case. They may not consult with any person or party except openly and upon notice, save in the disposition of customary ex parte matters, and they may not be made subject to the supervision of prosecuting officers. The latter may not participate in the decisions except as witness or counsel in public proceedings. However, the subsection is not to apply in determining applications for initial licenses or the past reasonableness of rates; nor does it apply to the top agency or members thereof.

(d) *Declaratory orders*.—Every agency is authorized in its sound discretion to issue declaratory orders with the same effect as other orders.

Section 6. Ancillary matters

The provisions of section 6 relating to incidental or miscellaneous rights, powers, and procedures do not override contrary provisions in other parts of the bill.

(a) *Appearance*.—Any person compelled to appear in person before any agency or its representative is entitled to counsel. In other cases, every party may appear in person or by counsel. So far as the responsible conduct of public business permits, any interested person may appear before any agency or its responsible officers at any time for the presentation or adjustment of any matter. Agencies are to proceed with reasonable dispatch to conclude any matter so presented, with due regard for the convenience and necessity of the parties. Nothing in the subsection is to be taken as recognizing or denying the propriety of nonlawyers representing parties.

(b) *Investigations*.—Investigative process is not to be issued or enforced except as authorized by law. Persons compelled to submit data or evidence are entitled to retain or, on payment of costs, to procure copies except that in nonpublic proceedings a witness may for good cause be limited to inspection of the official transcript.

(c) *Subpenas*.—Where agencies are by law authorized to issue subpenas, parties may secure them upon request and upon a statement or showing of general relevance and reasonable scope if the agency rules so require. Where a party contests a subpoena, the court is to inquire into the situation and, so far as the subpoena is found in accordance with law, issue an order requiring the production of the evidence under penalty of contempt for failure then to do so.

(d) *Denials*.—Prompt notice is to be given of denials of requests in any agency proceeding, accompanied by a simple statement of grounds.

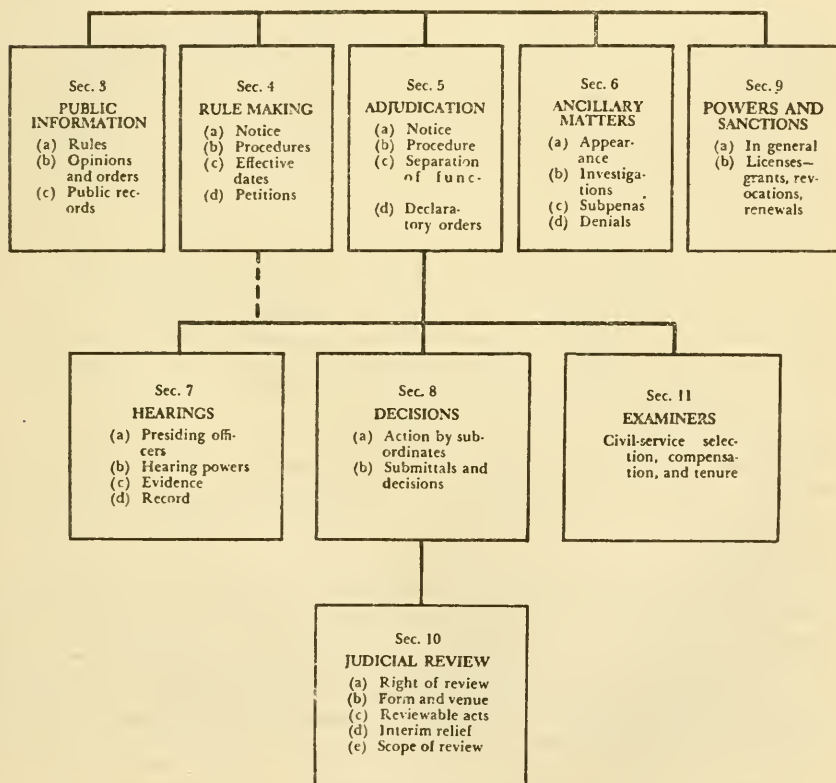
Section 7. Hearings

Section 7 relating to agency hearings applies only where hearings are required by sections 4 or 5.

(a) *Presiding officers.*—The hearing must be held either by the agency, a member or members of the board which comprises it, one or more examiners, or other officers specially provided for in or designated by other statutes. All presiding and deciding officers are to operate impartially. They may at any time withdraw if they deem themselves disqualified and, upon the filing of a proper affidavit of personal bias or disqualification against them, the agency is required to determine the matter as a part of the record and decision in the case.

(b) *Hearing powers.*—Presiding officers, subject to the rules of procedure adopted by the agency and within its powers, have authority to (1) administer oaths, (2) issue such subpoenas as are authorized by law, (3) receive evidence and rule upon offers of proof, (4) take depositions or cause depositions to be taken, (5) regulate the hearing, (6) hold conferences for the settlement or simplification of the issues, (7) dispose of procedural requests, (8) make decisions or recommended decisions under section 8 of the bill, and (9) exercise other authority as provided by agency rule consistent with the remainder of the bill.

OUTLINE OF PRINCIPAL SECTIONS OF ADMINISTRATIVE PROCEDURE BILL AS REPORTED FAVORABLY



Section 1 prescribes the title, Section 2, the definitions, and Section 3 the effective dates and rules of construction. In the above diagram, the first row of sections sets forth the several kinds of requirements, procedures, and limitations; and the second row includes hearing and decision requirements where other statutes require a hearing. Section 10 on judicial review relates not only to decisions made after agency hearing but, in appropriate cases, to the exercise of any other administrative power or authority.

(c) *Evidence*.—Except as statutes otherwise provide, the proponent of a rule or order has the burden of proof. While any evidence may be received, as a matter of policy agencies are required to provide for the exclusion of irrelevant and unduly repetitious evidence and no sanction may be imposed or rule or order be issued except as supported by relevant, reliable, and probative evidence. Any party may present his case or defense by oral or documentary evidence, submit rebuttal evidence, and conduct reasonable cross examination. However, in the case of rule making or determining applications for initial licenses, the agency may adopt procedures for the submission of evidence in written form so far as the interest of any party will not be prejudiced thereby.

(d) *Record*.—The record of evidence taken and papers filed is exclusive for decision and, upon payment of costs, is available to the parties. Where decision rests on official notice of a material fact not appearing in the evidence of record, any party may on timely request show the contrary.

Section 8. Decisions

Section 8 applies to cases in which a hearing is required to be conducted pursuant to section 7.

(a) *Action by subordinates*.—Where the agency has not presided at the reception of the evidence, the presiding officer (or any other officer qualified to preside, in cases exempted from subsection (c) of section 5) must make the initial decision unless the agency—by general rule or in a particular case—undertakes to make the initial decision. If the presiding officer makes the initial decision, it becomes the decision of the agency in the absence of an appeal to the agency or review by the agency on its own motion. On such appeal or review, the agency has all the powers it would have had in making the initial decision. If the agency makes the initial decision without having presided at the taking of the evidence, whatever officer took the evidence must first make a recommended decision except that, in rule making or determining applications for initial licenses, (1) the agency may instead issue a tentative decision or any of its responsible officers may recommend a decision or (2) such intermediate procedure may be wholly omitted in any case in which the agency finds on the record that the execution of its functions imperatively and unavoidably so requires.

(b) *Submittals and decisions*.—Prior to each recommended or other decision or review the parties must be given an opportunity to submit for the full consideration of deciding officers (1) proposed findings and conclusions or (2) exceptions to recommended decisions or other decisions being appealed or reviewed, and (3) supporting reasons for such findings, conclusions, or exceptions. All recommended or other decisions become a part of the record and must include (1) findings and conclusions, as well as the basis therefor, upon all the material issues of fact, law, or discretion presented by the record and (2) the appropriate agency action or denial.

Section 9. Sanctions and powers

Section 9, relating to powers and sanctions applies to the exercise of any power or authority by an agency.

(a) *In general*.—No sanction may be imposed or substantive rule or order be issued except within the jurisdiction delegated to the agency and as authorized by law.

(b) *Licenses*.—Agencies are required, with due regard for the rights or privileges of all interested parties or persons adversely affected, to proceed with reasonable dispatch to conclude and decide proceedings on applications for licenses. They are not to withdraw a license without first giving the licensee notice in writing and an opportunity to demonstrate or achieve compliance with all lawful requirements, except in cases of willfulness or those in which public health, interest, or safety requires otherwise. In businesses of a continuing nature, no license expires until timely applications for new licenses or renewals are determined by the agency.

Section 10. Judicial review—

Section 10 on judicial review does not apply in any situation so far as there are involved matters with respect to which statutes preclude judicial review or agency action is by law committed to agency discretion.

(a) *Right of review.*—Any person suffering legal wrong because of any agency action, or adversely affected within the meaning of any statute, is entitled to judicial review.

(b) *Form and venue of action.*—The technical form of proceeding for judicial review is any special proceeding provided by statute or, in the absence or inadequacy thereof, any relevant form of legal action (such as those for declaratory judgments or injunctions) in any court of competent jurisdiction. Moreover, agency action is also made subject to judicial review in any civil or criminal proceeding for enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) *Reviewable acts.*—Agency action made reviewable specially by statute or final action for which there is no other adequate judicial remedy is subject to judicial review. In addition, preliminary or procedural matters not directly subject to review are reviewable upon the review of final actions. Except as statutes may expressly require otherwise, agency action is final whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule) for an appeal to superior agency authority).

(d) *Interim relief.*—Pending judicial review any agency may postpone the effective date of its action. Upon conditions and as may be necessary to prevent irreparable injury, any reviewing court may postpone the effective date of any agency action or preserve the status quo pending conclusion of review proceedings.

(e) *Scope of review.*—Reviewing courts are required to decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of any agency action. They must (A) compel action unlawfully withheld or unreasonably delayed and (B) hold unlawful any action, findings, or conclusions found to be (1) arbitrary, (2) contrary to the Constitution, (3) contrary to statutes or short of statutory right, (4) without observance of procedure required by law, (5) unsupported by substantial evidence upon the administrative record where the agency is authorized by statute to hold hearings subject to sections 7 and 8 or review is otherwise confined to the record of an agency hearing provided by statute, or (6) unwarranted by the facts so far as the latter are subject to trial de novo. In making these determinations the court is to consider the whole record or such parts as the parties may cite, and due account must be taken of the rule of prejudicial error.

Section 11. Examiners.

Subject to the civil service and other laws not inconsistent with this bill, agencies are required to appoint such examiners as may be necessary for proceedings under sections 7 and 8, who are to be assigned to cases in rotation so far as practicable and to perform no inconsistent duties. They are removable only for good cause determined by the Civil Service Commission after opportunity for hearing and upon the record thereof. They are to receive compensation prescribed by the Commission independently of agency recommendations or ratings. One agency may, with the consent of another and upon selection by the Commission, borrow examiners from another. The Commission is given the necessary powers to operate under this section.

Section 12. Construction and effect.

Nothing in the bill is to diminish constitutional rights or limit or repeal additional requirements of law. Requirements of evidence and procedure are to apply equally to agencies and private persons except as otherwise provided by law. The unconstitutionality of any portion or application of the bill is not to affect other portions or applications. Agencies are granted all authority necessary to comply with the bill. Subsequent legislation is not to modify the bill except as it may do so expressly. The bill would become law 3 months after its approval except that sections 7 and 8 take effect 6 months after approval, the requirements of section 11 become effective a year after approval, and no requirement is mandatory as to any agency proceeding initiated prior to the effective date of such requirement.

V. GENERAL COMMENTS

The bill as reported is designed to operate as a whole and its provisions are interrelated. Certain provisions touch on subjects long regarded as of the

highest importance. On those subjects, such as the separation of examiners from the agencies they serve, there has been a wide divergence of views. The committee has in such cases taken the course which it believes will suffice without going too far at this time. Moreover, amendatory or supplementary legislation can supply any deficiency which experience discloses.

The committee believes that special note should be made of the following situations:

The exemption of rule making and determining initial applications for licenses from provisions of sections 5 (c), 7 (c), and 8 (a) may require change if, in practice, it develops that they are too broad. The committee feels that, where cases present sharply contested issues of fact, agencies should not as a matter of good practice take advantage of the exemptions.

Should the preservation in section 7 (a), of the "conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute," prove to be a loophole for avoidance of the examiner system in any real sense, corrective legislation would be necessary. That provision is not intended to permit agencies to avoid the use of examiners, but to preserve special statutory types of hearing officers who contribute something more than examiners could contribute and at the same time assure the parties a fair and impartial procedure.

The basic provision respecting evidence in section (c)—requiring that any agency action must be supported by plainly "relevant, reliable, and probative evidence"—will require full compliance by agencies and diligent enforcement by reviewing courts. Should that language prove insufficient to fix and maintain the standards of proof, supplemental legislation will become necessary. The standards and principles of probity and reliability of evidence must be the same as those prevailing in courts of law or equity in nonadministrative cases. There are no real rules of probity and reliability even in courts of law, but there are certain standards and principles—usually applied tacitly and resting mainly upon common sense—which people engaged in the conduct of responsible affairs instinctively understand and act upon. They may vary with the circumstances and kind of case, but they exist and must be rationally applied. These principles to govern in administrative proceedings.

The "substantial evidence" rule set forth in section 10 (e) is exceedingly important. As a matter of language, substantial evidence would seem to be an adequate expression of law. The difficulty comes about in the practice of agencies to rely upon (and of courts to tacitly approve) something less—to rely upon suspicion, surmise, implications, or plainly incredible evidence. It will be the duty of the courts to determine in the final analysis and in the exercise of their independent judgment, whether on the whole record the evidence in a given instance is sufficiently substantial to support a finding, conclusion, or other agency action as a matter of law. In the first instance, however, it will be the function of the agency to determine the sufficiency of the evidence upon which it acts—and the proper performance of its public duties will require it to undertake this inquiry in a careful and dispassionate manner. Should these objectives of the bill as worded fail, supplemental legislation will be required. "Substantial evidence" means evidence which on the whole record is clearly substantial, sufficient to support a finding or compulsion under section 7 (c), and material to the issues.

The foregoing are by no means all the provisions which will require vigilant attention to assure their proper operation. Almost any provision of the bill, if wrongly interpreted or minimized, may present occasion for supplemental legislation. On the other hand, should it appear at any time that the requirements result in some undue impairment of a particular administrative function, appropriate amendments or exceptions may be in order.

This is not a measure conferring administrative powers but is one laying down definitions and stating limitations. These definitions and limitations must be interpreted and applied by agencies affected by them in the first instance. But the enforcement of the bill, by the independent judicial interpretation and application of its terms, is a function which is clearly conferred upon the courts in the final analysis.

It will thus be the duty of reviewing courts to prevent avoidance of the requirements of the bill by any manner or form of indirection, and to determine the meaning of the words and phrases used. In several provisions the expression "good cause" is used. The cause so specified must be interpreted by the context of the provision in which it is found and by the purpose of the entire section and bill. Cause found must be real and demonstrable. If the agency is proceeding upon a statutory hearing and record, the cause will appear there; otherwise it must be such that the agency may show the facts and considerations warranting the finding in any proceeding in which the finding is challenged. The same would be true in the case of findings other than of good cause, required in the bill. As has been said, these findings must in the first instance be made by the agency concerned; but, in the final analysis, their propriety in law and on the facts must be sustainable upon inquiry by a reviewing court.

The committee recommends that the bill as reported be enacted.

(Following are inserts which were also printed in the above pages in December 1945 American Bar Association Journal and which are referred to by Mr. Montague:)

ATTORNEY GENERAL'S STATEMENT APPROVING PROPOSED ADMINISTRATIVE PROCEDURE ACT

(On October 19, 1945, there was delivered to the chairmen of the Committees on the Judiciary in the Senate and House of Representatives of the Congress of the United States from Attorney General Tom C. Clark a letter which, apart from its recitals and formal paragraphs, reads as follows:)

I appreciate the opportunity to comment on this proposed legislation.

For more than a decade there has been pending in the Congress legislation in one form or another designed to deal horizontally with the subject of administrative procedure, so as to overcome the confusion which inevitably has resulted from leaving to basic agency statutes the prescription of the procedures to be followed or, in many instances, the delegation of authority to agencies to prescribe their own procedures. Previous attempts to enact general procedural legislation have been unsuccessful generally because they failed to recognize the significant and inherent differences between the tasks of courts and those of administrative agencies or because, in their zeal for simplicity and uniformity, they proposed too narrow and rigid a mold.

Nevertheless, the goal toward which these efforts have been directed is, in my opinion, worth while. Despite difficulties of draftsmanship, I believe that overall procedural legislation is possible and desirable. The administrative process is now well developed. It has been subject in recent years to the most intensive and informed study—by various congressional committees, by the Attorney General's Committee on Administrative Procedure, by organizations such as the American Bar Association, and by many individual practitioners and legal scholars. We have in general—as we did not have until fairly recently—the materials and facts at hand. I think the time is ripe for some measure of control and prescription by legislation. I cannot agree that there is anything inherent in the subject of administrative procedure, however complex it may be, which defies workable codification.

* * * * *

The bill appears to offer a hopeful prospect of achieving reasonable uniformity and fairness in administrative procedures without at the same time interfering unduly with the efficient and economical operation of the Government. Insofar as possible, the bill recognizes the needs of individual agencies by appropriate exemption of certain of their functions.

After reviewing the committee print, therefore, I have concluded that this Department should recommend its enactment.

HISTORY OF ADMINISTRATIVE LAW BILLS

ADMINISTRATIVE COURT

S. 1835 (Norris)
73d Congress, 1st Session

S. 3787 (Logan)—H. R. 12297
(Celler)
74th Congress, 2d Session

S. 3676 (Logan)
75th Congress, 3d Session
H. R. 234 (Celler)
76th Congress, 1st Session

S. 916 (Logan)—H. R. 4235
(Celler)
76th Congress, 1st Session

Report of President's Committee
on Administrative Management
January 8, 1937

Twenty-seven Monographs of the
Attorney General's Committee on
Administrative Procedure
Sen. Doc. 186—76th Congress,
3d Session
Sen. Doc. 10—77th Congress,
1st Session

Report of Attorney General's
Committee on Administrative
Procedure
Sen. Doc. 8—77th Congress,
1st Session

ADMINISTRATIVE PROCEDURE

S. 915 (Logan)—H. R. 4236
(Celler)—H. R. 6324 (Walter)
76th Congress, 1st Session

S. 674—H. R. 4238
(Attorney General's Committee,
Minority)
77th Congress, 1st Session

S. 675—H. R. 4782
(Attorney General's Committee,
Majority)
77th Congress, 1st Session

S. 918 (Logan)—H. R. 3464
(Walter)
77th Congress, 1st Session

H. R. 4314 (Gwynne)
78th Congress, 2d Session

S. 2030 (McCarran)—H. R. 5081
(Sumners)
78th Congress, 2d Session

H. R. 5237 (Smith)
78th Congress, 2d Session

S. 7 (McCarran)—H. R. 1203
(Sumners)
79th Congress, 1st Session

COMPARISON OF BILLS AS TO ADMINISTRATIVE LAW AND PROCEDURE

For convenient study by association members, the following summary compares and contrasts the provisions of the pending bill (S. 7 as revised) emanating from the minority in the Attorney General's committee in 1941 (approved in principle and supported by the association) and the Walter-Logan bill (drafted and supported by the association in 1939). The comparison shows the reasons which lead the association's committee on administrative law to regard the present bill, now reported favorably in the Senate, to be an improvement upon the previous bills as well as a long and remedial step in the right direction.

BILL NOW PENDING (1945)

(S. 7 and H. R. 1203, 79th Cong. For revised text and comments thereon, see S. Rept. 752 of November 19, 1945.)

SEC. 1. *Title*.—"Administrative Procedure Act."

SEC. 2. *Definitions*.—Defines (a) agency, excepting representative and war agencies, (b) person and party, (c) rule and rule making, (d) order and adjudication, (e) license and licensing, (f) sanction and relief, (g) agency proceeding and action.

SEC. 3. *Public information*.—Except secret functions and internal management: (a) Agencies are required to publish or file, (b) opinions and orders are to be published or open to inspection, and (c) official records are to be made available to properly interested persons.

SEC. 4. *Rule making*.—Except war, foreign affairs, management, and proprietary functions: (a) Notice of rule making is to be published in certain instances, (b) there-

MINORITY BILL FROM THE ATTORNEY-GENERAL COMMITTEE (1941)

(S. 674, 77th Cong. For correct text see Senate hearings (1941), p. 1402, and H. R. 1203, 76th Cong.)

Same title [sec. 100].

Definitions not as complete [sec. 102]. Subdelegations of authority authorized [sec. 103].

Similar provisions respecting the issuance of rules [secs. 202, 203, 205]. Decisions must be published [sec. 308 (m) (7)] but no provision for access to public records.

Similar general exceptions [sec. 201]; protection for reliance on published rules [sec. 204]; similar notice [sec. 208]; similar procedure [sec. 209]; less definite

WALTER-LOGAN BILL (1939)

(H. R. 6324, 76th Cong. For final text, see H. Doc. No. 986, 76th Cong., 3d sess.)

No title.

Agencies defined by form or independence [sec. 1 (3) and (4)] but many exempted by name or subject matter [sec. 7 (b) 1]. Only "interpretative" rules defined [sec. 1 (1)], thereby excluding rules of substance, procedure, and policy as well as forms and instructions. Adjudication defined as "specific controversies" or disputes respecting any claim, right, obligation, privilege, or license [sec. 1 (8) and (9) 1]. No definition of sanction or relief.

No provision except that no one to be held liable for compliance with rescinded or invalid rules except after published rescission or declaration of invalidity [sec. 2 (d) 1].

Rules to be made on notice of proposed rule and hearing; existing rules to be subject to mandatory reconsideration; and rules to be effective only upon publication

after interested persons are to be permitted to make at least written submittals for agency consideration, except that if other statutes require an agency hearing then sections 7 and 8 apply, (c) effective date of rules is to be 30 days following publication, and (d) any interested person may petition for issuance, amendment, or repeal of a rule.

SEC. 5. *Adjudication.*—Where statutes require a hearing: (a) Contents of notice are specified, (b) hearings are to be held under sections 7 and 8 to the extent issues cannot first be settled informally, (c) hearing officers are required to operate entirely separate from prosecuting officers and to make or recommend the decision in the case, and (d) agencies are authorized to issue declaratory orders.

SEC. 6. *Ancillary matters.*—(a) Parties are entitled to counsel. (b) Investigations are to be confined to authority granted agencies and witnesses are entitled to copies of testimony. (c) Subpenas are to be issued to parties on request and reasonable showing, and are to be judicially enforced if in accordance with law. (d) Written notice and statement of grounds is to be given in denying any request in any agency proceeding.

SEC. 7. *Hearings.*—In hearings which sections 4 or 5 require to be conducted under this section: (a) Presiding officers are to be the agency or its members, ex-

cept upon Presidential declaration of emergency [sec. 2 (a)-(c)]. No provision for petitions.

No provision as to notice or contents thereof. Nothing respecting separation of prosecuting from hearing or deciding functions. No declaratory orders. Agency hearings required in every case [sec. 4 (a) and (d)], thereby impliedly destroying rights of judicial trial *de novo* since judicial review would presumably be confined to the administrative record.

No specification of rights of appearance or counsel, except attorneys to be eligible to practice before agencies "unless otherwise prohibited by law" [sec. 7 (c)]. No limitations on investigative powers. Subpena powers affirmatively granted but only in the case of adjudications by nonindependent agencies [sec. 4 (c)]. No provisions respecting administrative denials of requests.

Employee-boards to hear adjudications in nonindependent agencies, in which any one showing "substantial interest" may intervene [sec. 4 (a) and (b)]. Examiners

provision for deferred effective dates [sec. 207]; similar right of petition [sec. 210]; rulings not to serve as rules [sec. 212]; and provides for annual transmission of rules to Congress [sec. 213].

Provisions apply in all cases not specially excepted and whether or not other statutes require a hearing [sec. 301]; similar notice requirements [secs. 305, 306]; similar procedure [secs. 303, 307]; similar separation of functions [sec. 308 (a)]; and similar provision as to declaratory rulings [sec. 304]. Would, in effect, presumably eliminate trials *de novo* on judicial review by providing for administrative hearings and record in all subjects not specially excepted.

Similar provisions as to appearance [sec. 104]; statement as to admissions to practice, suspension, or debarment [sec. 105]; similar requirement for expediting cases [sec. 302]; more elaborate limitations on investigations [sec. 106]; more limited provision respecting subpenas [sec. 107].

Similar provision respecting presiding officers [sec. 308 (b)] as well as their disqualification [sec. 308 (d)] and powers [sec. 308 (e) and (g)]. Provision for en-

aminers, or others specially provided for in other statutes, all to act impartially and be subject to disqualification, (b) presiding officers are to have authority necessary to conduct the hearing and dispose of motions, (c) irrelevant and repetitious evidence is to be excluded as a matter of policy and no sanction is to be imposed or rule or order issued except as supported by relevant, reliable, and probative evidence, and (d) record of the hearing is to be exclusive for purposes of decision.

SEC. 8. *Decisions*.—Where hearing is required under section 7: (a) Examiners are to make either initial decision or recommended decision, as the agency may determine, and (b) prior to any recommended or other decision the parties are entitled to submit suggested findings, exceptions, and supporting reasons and all decisions are to include findings on material issues and a statement of the appropriate action.

SEC. 9. *Sanctions and powers*.—In exercise of any power or authority: (a) No sanction is to be imposed or rule or order issued save within jurisdiction delegated and authority granted by law, (b) license applications are to be acted upon promptly, revocation is not to be attempted except upon notice and opportunity for the licensee to comply with lawful requirements, and renewals are not to be deemed denied until finally acted upon.

SEC. 10. *Judicial review*.—Except so far as statutes preclude judicial review or agency action is by law committed to

enforcement of process [sec. 308 (f)]]. Similar provisions as to evidence [sec. 308 (b) and (i)] and record [sec. 308 (l) and (j)]]. However, these provisions do not apply to rule making [see sec. 209 (d)]].

Examiners to make initial decisions [sec. 308 (b), (k), and (m)] subject to appeal or review by the agency [sec. 308 (n) and (o)]]. All decisions to be accompanied by reasons and findings [sec. 308 (m)]]. However, these provisions do not apply to rule making.

Contains only general limitations [sec. 309] and limitations on publicity [sec. 108].

As to rules, provision for judicial review through declaratory judgment procedure respecting constitutional, statutory, or

may hear cases in independent agencies of three or more members [sec. 4 (d)]. No specification of hearing powers except authority to administer oaths in adjudications by nonindependent agencies [sec. 4 (c)]. No specification of evidence requirements, except rights of examination and cross examination in cases of adjudication [sec. 4 (c)]. Provision for record in adjudications by nonindependent agencies [sec. 4 (b)], but no provision respecting taking of official notice. However, these provisions do not apply to rule making.

Adjudications to be made by employee-boards of nonindependent agencies, subject to revision by agency head [sec. 4 (b)]. Independent agencies of less than three members to proceed similarly; those of three or more members may have examiners hear cases, subject to rehearing by three members [sec. 4 (d)]. In either case there are to be written findings and decision [sec. 4 (b) and (d)]. No provision for decisions in rule making.

No provision.

In the case of rules, judicial review within 30 days or publication in District of Columbia Appeals Court, without pre-

agency discretion: (a) any person suffering legal wrong is entitled to judicial review, (b) the form of action is to be that specially provided by any statute or, in the absence or inadequacy thereof, any appropriate common-law action, (c) every action for which there is no other adequate remedy is made subject to such review, (d) agencies or courts may stay agency action or preserve status or rights pending review, and (e) reviewing courts, upon the whole record and with due regard for the rule of prejudicial error, are to determine all questions of law, compel agency action unlawfully withheld, and hold unlawful action found. (1) arbitrary, (2) not in accord with the Constitution, (3) in violation of any statute, (4) without observance of procedure required by law, (5) unsupported by substantial evidence on the record in cases subject to sections 7 and 8, or (6) unwarranted by the facts to extent that facts are subject to trial *de novo* by the reviewing court.

Sec. 11. *Examiners*.—Examiners are to be appointed pursuant to Civil Service for proceedings under section 7 and 8 and may perform no inconsistent duties. They are removable only for good cause determined by Civil Service Commission after hearing, which is subject to judicial review. They are to receive compensation prescribed and adjusted by Civil Service Commission independently of agency recommendations or ratings.

procedural questions; but facts of applicability to be determined by agency [sec. 211]. As to adjudications, similar provisions [sec. 310] but no provision for compelling agencies to act, authorizing interim relief, or recognizing rights to trials *de novo*.

judice to other review authorized by law; scope of review limited to constitutional, statutory authority, or procedural questions [sec. 3]. In the case of adjudications, within 30 days petition for review may be filed with District of Columbia Appeals Court or Circuit Court of Appeals or Court of Claims for review respecting constitutional or statutory questions, substantial evidence, support by findings of fact, agency jurisdiction, or adequacy of notice and hearing [sec. 5]. No specification of remedies for situations arising before or after the review so provided. No statement of reviewable acts. No provision for interim relief except that adjudications impliedly not enforceable pending review [sec. 4 (b) 1]. No recognition of rights of trial of facts *de novo*. "Insubstantial" petitions for review to be penalized by costs [sec. 6].

No provision.

Elaborate provision for an Office of Federal Administrative Procedure with a director appointed by the President who, with a judge and the Director of the Administrative Office of the United States (Courts), would conduct research [sec. 109] and approve, determine compensation of, and remove examiners [sec. 308 (c)].

SEC. 12. *Construction and Effect.*—The act is not to impair other or additional legal rights. Procedure is to apply equally Saving clause. Authority is granted to agencies to comply with the act. Subsequent repeals are to be express. Effective dates are to be deferred and the act is not to apply to proceedings previously begun.

Declarations of policy [secs. 101, 200, 300]. Other legal requirements preserved [secs. 209 (g) and 310 (a)]. Special enforcement provisions [sec. 110]. Provision for Presidential suspension [sec. 111]. Saving clause [sec. 112] and effective dates [sec. 113].

Existing judicial remedies preserved [sec. 7 (a)].

The importance of an Administrative Procedure Act is greater than its precise terms. Such a statute will provide a juristic new start in the field of administrative law. It will define some of the fundamental and essential procedural rights, one of which is that every agency shall publish its procedures in detail for all to know. It will lay the foundation for further legislation as future need and further experience point the way. It will free the Congress, when new administrative powers are proposed or old ones are being revised, to give attention to matters of substance without endlessly reconsidering and revising procedures of particular agencies. It will thus make possible a greater and growing measure of justice through government under law. It thus may become perhaps the most important event in improving the administration of justice in the modern sense since the Judiciary Act of 1789.

Following the pages above quoted from December 1945 American Bar Association Journal is the editorial in the same issue to which Mr. Montague referred, in which the Journal editors refer to the address of Circuit Judge John D. Martin which has several times been quoted in these hearings by Congressman Reece and James F. Hoge, following which the Journal editors disagree with Judge Martin and say:

By no means all lawyers and judges would go as far as Circuit Judge John D. Martin did in his recent address before the Sixth Circuit Judicial Conference, quoted elsewhere in this issue, and by no means all would agree with his informal statement of the present court-made limitations on review—

and so forth. The complete editorial is as follows:

THE ADMINISTRATIVE PROCEDURE BILL

One of the most gratifying steps forward, in the history of the American Bar Association's long fight for reforms in administrative law and procedure, was taken on November 19, when the Senate Committee on the Judiciary reported favorably the bill of its chairman, Senator Pat McCarran, of Nevada (S. 7 as revised), with a strong and persuasive recommendation for its enactment.

The action of the committee was taken under circumstances so auspicious and favorable as to give an unusual significance and encouragement. The members of the committee had devoted most painstaking consideration to the provisions and text of the bill, had taken into account the views and suggestions of public-minded members of the administrative agencies as well as of interested organizations and individuals, and had worked closely and cooperatively with the Attorney General of the United States.

The result is a bill which is strongly supported by the committee, in a cogent report which will be a landmark in the struggle to bring the administrative agencies within the framework of American justice according to law. The bill as reported had been approved unanimously by the American Bar Association's committee on administrative law, and is fully in line with the action voted by the association, as to the earlier draft, through its representative house of delegates in 1944 (30 A. B. A. J. 185-193) and by its board of governors last April (31 A. B. A. J. 245).

Most fortunately for the prospects of the early enactment of this long-needed measure of reform, the bill is approved and recommended by the Department of Justice, through Attorney General Tom C. Clark, whose statement is quoted elsewhere in this issue.

Our columns this month contain in convenient form such information and analyses as our readers will wish, as to the bill as recommended and the committee's presentation of it. Appropriately, the extended synopsis of the bill is not our own, but is taken from the committee's clear and comprehensive report, which becomes a part of the important legislative history of the measure if it becomes law. Our readers will find that many of the committee's declarations concerning the bill, the need and reasons for it, and the intended effect of its provisions, have the utmost significance.

The bill as first drafted was introduced also in the House of Representatives (H. R. 1203) by the chairman of its Committee on the Judiciary, Judge Hatton W. Sumners, of Texas; and the measure has many strong adherents, in the committees and on the floor, of each the Senate and the House.

The previous debate and vote in the house of delegates in recommending strongly the enactment of the administrative procedure bill as first drafted by the association's special committee, together with the favorable action of the board of governors this year in authorizing and approving the present bill, have aligned the association in full and hearty support of it. The fortunate results secured, for the public and the profession, under the authorizations voted by the house of delegates and the board of governors, will be reported to the house when it convenes in Cincinnati on December 17.

It seems to be appropriate and fully warranted to say at this time that the favorable report on the bill and the support which it is receiving from Attorney General Clark and others, reflect a remedial and common-sense approach to the

subject, on the part of spokesmen for the administrative agencies as well as in the Congress. There seems to be now a general realization that substantial reforms in this field of law have long been needed, were deplorably delayed by the war, and should now be undertaken in a spirit of fairness and conformance to American standards of due notice, fair hearing, and impartial decision.

By some members of the association it will be regretted that the present provisions for "judicial review" do not go as far as they would have wished, and there may be fears that the language of the bill will be construed to permit less of judicial scrutiny than the committee has stated that its measure is drafted to assure. Other members of the association may feel that the bill goes too far, in enlarging the scope of judicial review. In the American Bar Association and its house of delegates, the views of the members have been strongly on the side of a more substantial and searching judicial review than has been accorded under many of the recent decisions of the courts. By no means all lawyers and judges would go as far as Circuit Judge John D. Martin did in his recent address before the Sixth Circuit Judicial Conference, quoted elsewhere in this issue, and by no means all would agree with his informal statement of the present court-made limitations on review; but there is undoubtedly a feeling of concern and dissatisfaction, widely held among lawyers, their clients, and some judges, that the substance of rights is imperiled by the substitution of administrative agencies for law-governed courts and the curbing of the judicial power to see to it that justice has not been denied.

The report of the Senate committee makes it clear that as to judicial review, as on other subjects, the present bill makes a substantial beginning of progress in the right direction, not the ultimate of legislative action. On more than a few points, the committee states its awareness that the bill's provisions could be evaded or whittled away, by an agency or court hostile to the legislative purpose. The Senate committee admonishes that it does not propose to permit such a thing to last long if it does transpire; it promises that corrective legislation will be sponsored, to assure the carrying out of the legislative intent. If enacted by the present Congress, the measure will in any event be improved and strengthened from time to time, in the light of the experience under it. The report leaves no doubt of the firmness of the committee's purpose to deal adequately with the abuses and to require their elimination or correction.

At a time when so many voices in the world are confused and anxious, and when the restoration of law-governed liberties seems to hang in the balance in so many lands, it is heartening news indeed that the Senate of the United States, through its Committee on the Judiciary, is taking the first step toward remedying abuses which have long been evident and seem now to be generally admitted. Members of the American Bar Association have reason for satisfaction in the fact that their organization "stuck to its guns" in the long uphill struggle against administrative absolutism, and that an important step forward has now been taken in the Congress, under circumstances which give reasonable assurance of success if lawyers and other citizens rally in support of the pending measure.

We felicitate the Senate committee, the Attorney General, the representatives of agencies, the association's special committee, and all concerned, on the equable spirit in which this vital bill has been perfected and the admirable way in which it is now reported and supported.

Mr. SADOWSKI. Have we any witnesses here who have a short statement to make?

Mr. DAVIS. We do not have any witnesses who will get through in half an hour.

We have, as I indicated before, assigned certain phases of the hearings to different members of the staff to cover that, instead of trying to have a lot of short witnesses, and the next witness we would introduce would be the assistant chief counsel, Mr. Whiteley. He will discuss the proposals with respect to reducing the penalties and certain other things which have been brought out by the proponents of the bill in their testimony.

He cannot finish in half an hour.

Mr. SADOWSKI. I am afraid that we cannot continue much longer than 20 minutes, because after we complete the Consent Calendar, the House will take up consideration of the housing bill.

Mr. O'HARA. There will be quorum call on that.

Mr. SADOWSKI. Then we will have a quorum call. We might as well adjourn until tomorrow morning at 10 o'clock.

(Whereupon, at 12:25 p. m., Monday, March 4, 1946, the committee adjourned until 10 o'clock Tuesday, March 5, 1946.)

AMEND FEDERAL TRADE COMMISSION ACT

TUESDAY, MARCH 5, 1946

HOUSE OF REPRESENTATIVES,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D. C.

The subcommittee reconvened at 10 a. m., Hon., George G. Sadowski, chairman of the subcommittee, presiding.

Mr. SADOWSKI. The subcommittee will come to order.

STATEMENT OF RICHARD P. WHITELEY, ASSISTANT CHIEF COUNSEL, FEDERAL TRADE COMMISSION

Mr. WHITELEY. Mr. Chairman, at the session last Thursday, just before the closing of the session, I gave my name and position with the Commission. I believe the record already contains that, and I will begin with my prepared statement.

Mr. Chairman and members of the committee, I shall address myself primarily to the proposed section 2 of H. R. 2390, which deals with civil penalties and amends the present act so as to read as follows:

(1) Any person, partnership, or corporation who violates an order of the Commission to cease and desist after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than \$1,000 for each violation, not to exceed the sum of \$10,000 in the aggregate, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

Under the present law; that is, the Wheeler-Lea amendment adopted in 1938, there is a maximum penalty provided of \$5,000 for each violation with no aggregate limitation. The proposed amendment would provide a maximum penalty of \$1,000 for each violation, with a further provision that the aggregate civil penalty in any one case shall not exceed the sum of \$10,000.

Since the passage of the Wheeler-Lea amendments, approved March 21, 1938, penalties and costs for the violation of cease and desist orders issued by the Federal Trade Commission have been assessed in 41 cases. As the committee is well aware, proceedings for the recovery of civil penalties are brought under the direction of the Attorney General by the several United States attorneys in Federal district courts.

The following table gives the name of the respondent in each of the 41 cases, the commodity involved, the United States district court in which the penalty proceeding was brought, the amount claimed in the bill of complaint, and the penalty and costs assessed in each case.

I ask that this table be incorporated as a part of my remarks at this point so that it will be available to the committee, but I shall not take the committee's time to recite the above-stated details of each case.

(The table referred to is as follows:)

FTC Docket No.	Respondent	Commodity	United States district court	Penalty pleaded	Penalty and costs assessed
1857	K & S Sales Co.....	Novelties.....	Northern district, Illinois..	\$40,000	\$4,500.00
3123	John Petrie.....	Emmenagogue.....	do.....	30,000	2,500.00
2652	Holst Publishing Co.....	Encyclopedia.....	Southern district, Iowa.....	50,000	2,000.00
1788	Elmer Candy Co.....	Candy lottery.....	Eastern district, Louisiana..	20,000	1,000.00
3111	Deran Confectionery Co.....	do.....	District of Massachusetts.....	20,000	1,000.00
1579	Klimate Proof Manufacturing Co.....	Paints.....	Middle district, North Carolina.	5,000	1,000.00
3059	Mells Manufacturing Co.....	Candy lottery.....	Eastern district, New York.	15,000	600.00
3075	Herbal Medicine Co.....	Proprietary medicine.....	District of Maryland.....	20,000	100.00
2229	Joseph A. Piuma.....	do.....	Southern district, California.	60,000	3,250.00
2696	Walter T. Hall & Co.....	Candy lottery.....	Southern district, Iowa.....	15,000	1,000.00
2939	Helena Rubinstein.....	Cosmetics.....	Southern district, New York.	15,000	3,000.00
2665	J. H. Casey Co.....	Proprietary medicine.....	District of Oregon.....	40,000	40.00
2777	Plantation Chocolate Co.....	Candy lottery.....	Eastern district, Pennsylvania.	20,000	600.00
3440	Perfect Manufacturing Co.....	Tire fluids.....	Southern district, Ohio.....	15,000	1,000.00
2319	Chesapeake Distilling & Distributing Co.....	Whisky.....	District of Maryland.....	20,000	100.00
3166	Mutual Printing Co.....	Sales promotion plans.....	Northern district, Illinois.....	20,000	1,500.00
2412	Montebello Distillers.....	Whisky.....	District of Maryland.....	10,000	100.00
3160	Oppenheim, Collins & Co., Inc.....	Women's clothing.....	Southern district, New York.	5,000	1,500.00
2607	Levore Co.....	Radio sets.....	Northern district, Illinois.....	30,000	500.00
2529	American Beauty Products Co.....	Cosmetics.....	do.....	35,000	2,500.00
3011	Midwest Studios.....	Portraits.....	District of Oregon.....	50,000	1,500.00
3042	Gynex Corp.....	Contraceptives.....	Southern district, New York.	30,000	500.00
3261	Pioneer Advertising Co.....	Sales promotion plans.....	Northern district, Illinois.....	35,000	525.00
3630	Midwest Sales Syndicate.....	Batteries, bulbs.....	do.....	50,000	750.00
3617	Hiram E. Barber.....	Automobile-testing devices.....	District of Nebraska.....	25,000	500.00
3045	Melster Candy Co.....	Candy lottery.....	Western district, Wisconsin.	5,000	1,000.00
2959	Sweets Co. of America.....	do.....	District of New Jersey.....	45,000	1,000.00
3060	American Television Institute.....	Correspondence school.....	Northern district, Illinois.....	45,000	2,500.00
2621	Sweet Candy Co.....	Candy lottery.....	District of Utah.....	45,000	1,000.00
2874	Wilson Chemical Co.....	Novelties.....	Western district, Pennsylvania.	45,000	1,800.00
3073	Emile Carpentier.....	Proprietary medicine.....	District of New Jersey.....	15,000	15,029.21
3238	William C. Steffy et al.....	Silverware sales promotion.....	Northern district, Illinois.....	50,000	5,000.00
1880	Gellman Bros.....	Novelties.....	District of Minnesota.....	30,000	1,500.00
3075	Herbal Medicine Co.....	Proprietary medicine.....	District of Maryland.....	95,000	500.00
3486	Certane Co.....	Contraceptives.....	Southern district, California.	15,000	774.40
3198	Rogers Redemption Bureau.....	Silverware sales promotion.....	District of Minnesota.....	20,000	400.00
3051	Lanteen Laboratories, Inc.....	Contraceptives.....	Northern district, Illinois.....	40,000	2,526.22
4193	Kongo Chemical Co.....	Hair dye.....	Southern district, New York.	20,000	200.00
2132	Irving Roy Jacobson.....	Books.....	Western district, Wisconsin.	40,000	1,000.00
2480	G. Leach & Co.....	Pottery.....	Eastern district, Pennsylvania.	20,000	1,033.40
2641	Rango Tablet Co.....	Nostrums.....	Southern district, California.	5,000	5,023.10

MR. WHITELEY. I do desire to call the attention of the committee to the fact that in only one of the 41 cases has the penalty assessed by the district court exceeded the aggregate of \$10,000 which is sought to be imposed as a limitation in the proposed amendment. This was in a particularly aggravated case in which an individual in Bergen County, N. J., who called himself "Dr. Emile Carpentier," manufactured and sold a product called "TB compound," a proprietary preparation, advertised as a cure for tuberculosis of the lungs, larynx, bones, intestines, kidneys, and brains, and as a cure for chronic bronchitis, colitis, chronic gastritis, and for ulcerated duodenum, stomach, and intestines. The Commission found that this so-called TB compound had no curative, remedial, or therapeutic value in the treatment of the various types of tuberculosis, or in the treatment of the other ailments for which it was recommended, that no one had been cured of tuberculosis by its use, and that physicians had not successfully prescribed it in the treatment of patients, all of which claims had been made by respondent. The Commission further found that the respondent was not a doctor of medicine, had never had any medical training, had never served as an interne in any hospital, or been connected with the medical profession in any way other than as an orderly in hospitals. It also found that he maintained no office or place of business where the condition of purchasers or prospective purchasers of his compound might be determined. The bill of complaint filed by the United States attorney asked the imposition of penalties totaling \$15,000, and the court assessed aggregate penalties of \$15,000, plus court costs of \$29.21.

In every other case, although the amounts claimed for violations extended from \$5,000 in several cases to as high as \$95,000 in one case where there were numerous and constant violations, the aggregate penalties assessed varied from as low as \$40 to as high as \$5,000. Manifestly, had the limitation sought to be imposed by the pending amendment been a part of the present law, the amounts claimed in the several bills would have been much smaller and the penalties assessed would have been correspondingly less. The Carpentier case referred to above and one other involving a medicine falsely advertised were the only 2 of the 41 in which the amount sought in the bill of complaint was allowed by the district court.

I think these figures show conclusively that there is no fear that the courts will "run wild" and assess huge amounts as penalties, or that, as one witness before the committee stated, "astronomical figures could be assessed." The courts take into consideration before assessing penalties both the gravity of the offense and the ability of the defendant to pay. This accounts for the rather small penalties assessed in several of the cases listed above.

On the other hand, if the maximum penalty for each violation were reduced from \$5,000 to \$1,000, with an aggregate limitation of \$10,000 for all violations, however numerous and continuous they may have been, the courts would be powerless to assess adequate penalties against large corporations and others engaged in price-fixing or other activities in restraint of trade for violations of the Commission's orders to cease and desist. In some of such cases whole industries are involved, and the practices sought to be prohibited might easily have resulted in very considerable profits. In such a case, the public interest would

be served only if penalties sufficiently substantial to constitute a real deterrent were assessed. Penalties as small as the proposed amendment provides would only lend encouragement to continuing violations, and in effect operate as a license to violate the law.

I think it is not necessary to make any further reference to the proposed change with respect to civil penalties. The pending bill does not provide any amendments to section 13 with respect to temporary injunctions and section 14 with respect to criminal prosecutions, but I want to make a very brief reference to those two sections, to show that the Commission and the Attorney General have been very reasonable in the application of the provisions of those two sections.

One of the provisions in the amendments adopted by Congress to the Federal Trade Commission Act in 1938 was section 13, with respect to the securing of a temporary injunction in cases where the Commission, pending the trial of a case before it, has reason to believe that the injunction of the dissemination of any false advertisement of a food, drug, device, or cosmetic in violation of section 12 would be in the interest of the public.

The Commission has used this injunction authority sparingly, and has applied for it in 38 instances only. Thirty-seven of the applications were granted, and that the thirty-eighth should have been granted was demonstrated by the fact that as the result of the Commission's trial of the case, an order to cease and desist was issued against respondent, which order has since become final.

Under section 14 of the Commission's act, also one of the provisions of the Wheeler-Lea amendments of 1938, it is provided that any person violating any provision of section 12 (a) with respect to the dissemination of a false advertisement shall, if the use of the commodity advertised may be injurious to health because of results from such use under the conditions prescribed in the advertisement thereof or under such conditions as are customary or usual, or if such violation is with intent to defraud or mislead, be guilty of a misdemeanor punishable by a fine or imprisonment or both. In one instance only has the Commission applied to the Attorney General for criminal prosecution under section 14, and in that case the defendant was convicted and a fine of \$1,000 was imposed.

I make these references both to the injunction and criminal proceedings to show that the Commission has been very sparing in exercising the authority granted it under its act, and has never sought the institution of proceedings in any injunction or criminal case, with the single exception of the injunction above referred to, in which the prosecution was not successful, and all of these proceedings in the civil penalty cases and the injunction cases and in the single criminal prosecution were proceedings before Federal district courts.

At this time I should like to correct a misunderstanding that may have arisen in the minds of the committee as the result of the testimony of one of the witnesses who appeared in support of the provisions of the bill. Mr. Isaac W. Digges, attorney, of New York City. In response to a question by a member of the committee as to whether, in the trial of cases before the Commission, the employees of other Federal agencies are equally available to the Commission and the respondent, Mr. Digges replied that he had had only one experience in that regard; that he had desired in behalf of a respondent to secure the testimony of a representative of the Bureau of Standards which was

thought to be important. Mr. Digges further stated that the representative, in reply to an inquiry from him, said that he could not testify for respondent without the prior consent of the Federal Trade Commission—that there was an interdepartmental rule of comity in that respect. In answer to a further question of another member of the committee as to whether he did not have the power of subpoena in behalf of his client, Mr. Digges correctly stated that plain subpoenas might be issued either upon request to the trial examiner or to the Secretary of the Commission, and that he had never had any experience of such a subpoena being unreasonably withheld. Upon a further question from the committee as to whether the witness from the Bureau of Standards appeared, Mr. Digges stated:

No, sir. The consent and the permission of the trial counsel was not forthcoming, and I didn't get him.

As the inability to secure the testimony of the witness, under the circumstances outlined by Mr. Digges, would amount to a denial of due process to respondent, on the day after Mr. Digges testified, I had the following letter written by one of my assistants to Mr. Digges:

DEAR MR. DIGGES: Mr. Whiteley has requested that I secure from you some information, if possible, in connection with the incident that you mentioned yesterday in your testimony at the hearings on the Reece bill when you testified in substance that upon an attempt to secure from the National Bureau of Standards of the Department of Commerce a witness to testify in a proceeding before the Commission, you were advised that the Bureau could not furnish the witness unless it had the consent of or permission from the Federal Trade Commission. As Mr. Whiteley recalled, you stated that this occurred in connection with some case you had before the Commission in 1935.

Would you kindly advise me the name of the case, the name of the desired witness, if you recall it, and the circumstances under which you made your request. I should also like to know whether or not you reported this matter to the trial attorney for the Commission, the trial examiner, or to the Commission itself, with the request that the attendance of this witness be secured, and, if so, with what result.

It would be appreciated if you would supply me this information at your earliest convenience.

To this letter Mr. Digges replied:

DEAR MR. THOMERSON: Answering your letter of January 30th, the incident referred to occurred during the late winter or early spring of 1940 during the course of the Good Housekeeping case—

that was a case brought against the Hearst Publishing Co., who publish Good Housekeeping, for alleged false representations made in that publication.

We had sought to produce witnesses from the Bureau of Standards in order to show (1) that the consumer testing done by Good Housekeeping was equal if not superior to that conducted by the Bureau, (2) that the Bureau made provision for marginal error in its testing, and (3) that the Bureau has often sought and received the assistance of Good Housekeeping with regard to testing consumer items, and in many cases adopted our own standards.

We do not recall the name of the person contacted in the Bureau.

We did not, ourselves, bring the matter to the attention of the Commission as we had been advised by the person in the Bureau of Standards that he had sought the Commission's permission and had been denied it.

In his testimony before the committee Mr. Digges had stated that he was prevented from securing the testimony of the Bureau of Standards' representative because the "consent and the permission of trial counsel was not forthcoming."

In reply to the letter from my office, he stated :

We did not, ourselves, bring the matter to the attention of the Commission as we had been advised by the person in the Bureau of Standards that he had sought the Commission's permission and had been denied it.

Whether Mr. Digges was so advised by any responsible person in the Bureau of Standards is not important. An examination of the Commission's files, however, fails to disclose any inquiry or request from the Bureau of Standards with respect to the matter. Had such a request been made orally, it should have come to my attention as I was directly in charge of the trial of cases of this character.

If the testimony was, as he stated, important to his client, Mr. Digges must have known, as any trial attorney of much less experience before the Commission knows, that all he had to do was to apply to the trial examiner or to the secretary of the Commission for the issuance of the subpoena, and that no rule or policy of comity would prevent the issuance of such a subpoena.

Mr. Digges indicated that he knows quite well that that is the fact in his statement in answer to a question by a member of the committee that he had never known the Commission unreasonably to refuse to issue a plain subpoena.

What I want to state most emphatically is that the Commission has never refused to issue a subpoena for any such person because of any such rule or policy of comity.

Mr. Digges is well aware of the fact that all he had to do in that or any other instance of like character was to inform the Commission that he desired the subpoena issued and the requisite directions would have been given by the Secretary of the Commission. If the production of the witness in question was as important as Mr. Digges had led this committee to believe, then his failure to secure a subpoena in the manner that he knew was available to him constituted a dereliction in his duty to his client. Be that as it may, I resent the plain imputation that the requirements of due process are not or have not been observed by the Commission, or its officials, in the trial of cases before it.

Several of the witnesses appearing in support of the provisions of the pending bill contend that the provisions of orders to cease and desist issued by the Commission in certain cases were too harsh in that they required respondents to cease the use of registered trademarks or trade names which had been used a number of years. In other words, their contention is that such respondents should have been permitted to continue the use of the deceptive trade-mark or trade name followed by qualifying or explanatory language.

One of the earliest cases decided by the Commission, and which has been a landmark in unfair-competition law since that time, was that one of the Winsted Hosiery Co. in which the order of the Commission was sustained by the Supreme Court, in its opinion handed down April 24, 1922.

The Commission had found that the word "Merino" as applied to wool meant "primarily and popularly" a fine, long-staple wool which commanded the highest price. It also found that a substantial part of the consuming public understood the words "Merino," "Natural Merino," and "Gray Merino," as applied to underwear, to mean that the underwear was all wool. That by means of the labels and brands

of the Winsted Co. bearing such words part of the public was misled into buying as all-wool underwear which in fact was in large part cotton.

It was contended on the part of respondent that the labels bearing the word "Merino" had long been established in the trade and were generally understood by it as indicating goods partly of cotton; that the trade was not deceived by them; that there was no unfair competition for which another manufacturer of underwear could maintain a suit against the Winsted Co.; and that even if consumers were misled because they did not understand the trade significance of the label, or because some retailers deliberately deceived them as to its meaning, the result was in no way legally connected with unfair competition.

The Supreme Court, however, held that the fact that

misrepresentation and misdescription have become so common in the knit-underwear trade that most dealers no longer accept labels at their face value does not prevent their use being an unfair method of competition. A method inherently unfair does not cease to be so because those competed against have become aware of the wrongful practice. Nor does it cease to be unfair because the falsity of the manufacturer's representation has become so well known to the trade that dealers, as distinguished from consumers, are no longer deceived.

The Court further said:

And trade-marks which deceive the public are denied protection although members of the trade are not misled thereby.

In the case of *H. N. Heusner & Son*, the Federal Trade Commission ordered a Pennsylvania manufacturer of cigars containing only Pennsylvania tobacco but which were branded "Havana Smokers," to cease and desist from using the word "Havana" to designate its product. The Circuit Court of Appeals for the Third Circuit was asked by respondent to modify this order so as to permit the retention of the word "Havana" with the following qualification:

Notice these cigars are made in the United States and only of United States tobacco.

The Court stated with respect to this request that—

The difficulty of petitioner's position lies in the fact that the implication of the word "Havana" is totally false. The purchaser can be guided by either label or legend, but not by both. This circumstance came before the Court of Appeals for the District of Columbia in a recent case. After a carefully considered review of the authorities the learned court concluded:

"* * * But the phrase 'Army and Navy' in the name 'Army & Navy Trading Co.' makes the single representation that at least the major portion of the merchandise offered for sale is in some sense Army and Navy goods. This single representation being untrue, it cannot be qualified; it can only be contradicted. The cases urged by the Trading Co. and above discussed justify qualification of a trade name where qualification is possible; they do not justify contradiction" (*Federal Trade Commission v. Army and Navy Trading Co.*, 88 F. (2d) 776, 780). We doubt if petitioner would accede to a true qualification—"Fake Havana Smokers."

Of course, they would not.

To the same effect was the decision of the Circuit Court of Appeals for the Fourth Circuit in *El Moro Cigar Company v. Federal Trade Commission*, decided November 6, 1939, in which the brand name "Havana Counts" had been used by the respondent for more than 33 years, 17 of which years had been after the establishment of the Commission, during which time the propriety of its use had not been

attacked. The court held that the word "Havana" being false per se, its impropriety could not be cured by the use of the sentence,

These cigars are made in the United States entirely and only of domestic tobacco.

The court continued,

Long use of a misleading brand can vest no right in the user. As was said by Mr. Justice Cardozo, in *F. T. C. v. Algoma Lumber Co.* (291 U. S. 67) :

"* * * The Federal Trade Commission was not organized till 1914, its jurisdiction then as now confined to interstate and foreign commerce. Silence up to that time is not even a faint token that the misapplied name had the approval of the industry. It may well have meant no more than this, that the evil was not great, or that there was no champion at hand to put an end to the abuse. Even silence thereafter will not operate as an estoppel against the community at large, whatever its effect upon individuals asserting the infringement of proprietary interest (*French Republic v. Saratoga Vichy Co.*, (191 U. S. 427)). There is no bar through lapse of time to a proceeding in the public interest to set an industry in order by removing the occasion for deception or mistake * * *"

It cannot be successfully contended that the interest of the public is not involved. As we said in the Walkers New River Mining case, *supra* :

"That the public interest is involved cannot be doubted. It is manifestly in the interest of the public to prevent the continuance of an unfair practice which tends to deceive the public and divert trade from competitors."

I might add also that the court of appeals in this case concluded its opinion in the following language :

The findings of fact made by the Commission are supported by the great weight of the evidence. The order made was a proper one and an order will be entered enforcing it.

The cases just cited conclusively show that neither registration nor long-continued use of a trade-mark or trade name which is false entitles the trader to any protection, and that where the trade-mark or name is false per se, its use should be absolutely prohibited, since the deception necessarily incident thereto cannot be cured by any qualifying or explanatory language.

Several of the witnesses appearing in support of the pending bill have referred to and quoted from the court of appeals' opinion in the Jacob Siegel Co. case.

I think every one of the witnesses who criticized the review given by the appellate courts to the Commission's orders referred to cases with which they had had nothing to do. I think not a single one of them referred to a case that he himself had tried before the Commission.

I recall distinctly that Mr. Digges stated that although orders to cease and desist had issued against him by the Commission, and I believe they have issued against his clients in five cases, he had not found it necessary to appeal or to file a petition for review in any one of these cases.

And I think the other gentlemen referred to cases which they had not tried. It may have been easier for them. They may not have been so tied down to the real facts. They may have been able to speak more recklessly and loosely when they were discussing cases that they had not tried and with which records they were not familiar.

Be that as it may, I want to discuss for a moment the Siegel Co. case, the so-called Alpacuna case, because that has been held up as a sort of horrible example of what happens in the judicial review of the Commission's cease-and-desist orders.

That case involved the deceptive and misleading use of the trade name "Alpacuna" for overcoats and topcoats manufactured by the Jacob Siegel Co., of Philadelphia. The contention has been made that it shows the inadequacy of court review of the Federal Trade Commission's orders to cease and desist.

In the Siegel case the respondent, about 1930, adopted the trade name "Alpacuna," a contraction of "alpaca" and "vicuna," for the garments manufactured by it, and widely advertised said trade name. It furnished its dealers suggested advertising copy for use by such dealers in advertising the so-called Alpacuna garments in newspapers published in the trade areas served by such dealers, and frequent and repeated use was made by said dealers of this copy. Among the statements found in such copy was the following:

Studying the sources of the famous Alpacuna fabric is a real geography lesson. From the South America Andes we took the warm, light, silky hairs of the alpaca. From the valleys of old Peru we took the fine, lustrous coat of the guanaco. From the plains of Turkestan we took the sturdy, durable hairs of the Angora. From the Texas Panhandle we chose the thickest, warmest, and richest sheep's wool. They were all brought together and scientifically blended into a fabric that's unmatched for richness, luxury, warmth, light weight, long wear.

The Commission found that in neither the overcoat nor the topcoat is guanaco hair used, with the exception that occasionally guanaco hairs may find their way into shipments of alpaca by the mill which manufactures the fabric for respondent. In such cases, however, the presence of guanaco hairs is due entirely to accident, and the amount of the same is negligible.

The Commission further found that the Angora-goat hair or wool used in the fabrics is not imported from Turkestan, or from any other foreign country, but is a domestic product obtained from Angora goats raised in Texas.

It also found that the use of the name "Alpacuna" by respondent was misleading and deceptive because it represented or implied that the coats so designated contained fibers obtained from the South American animal known as the vicuna. In fact, there was no vicuna fibers at all in the garments, the topcoat being composed of approximately 50 percent alpaca, 20 percent mohair, and 30 percent sheep's wool, and the overcoat being composed of about 70 percent of the three fabrics mentioned and of about 30 percent cotton backing.

In other words, a great many of the garments contained 30 per cent cotton, and there is not the slightest doubt but that the public understood that all of these garments were represented as being all-wool.

A number of witnesses, both persons in the trade and members of the consuming public, testified that to them the name "Alpacuna" indicated that the coat contained both alpaca and vicuna fiber, and that the presence of vicuna fiber was indicated by the suffix "cuna".

Upon consideration of the entire record, the Commission found that the use by the respondent of the foregoing representations with respect to its coats, including the use of the name "Alpacuna," has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public with respect to the fiber content of such coats and the origin of the materials used in such coats, and the tendency and capacity to cause such portion of the public to purchase substantial quantities of respondent's coats as the result of the erroneous and mistaken belief engendered by such representations. It further found

that in a substantial number of instances prospective purchasers were misled into the belief that vicuna fiber was present in respondent's coats, when in fact said coats contained no such fiber. Upon these facts and others fully set out in the Commission's findings, which I will not take the time to insert here, the Commission issued its order to cease and desist prohibiting the use of the word "Alpacuna," or any other word which in whole or in part is indicative of the word "vicuna," to designate or describe respondent's coats, and further prohibiting the respondent from otherwise representing, directly or by implication, that respondent's coats contain vicuna fiber.

The respondent contended before the circuit court of appeals that it had a valuable property right in its trade name "Alpacuna" and for that reason it should not be deprived of the continued use of such name. The trade name having been found by the Commission to be false per se, which findings were based upon substantial evidence, its continued use, whether qualified or not, was unwarranted and contrary to the interest of the consuming public and wholly without justification in the light of the opinions of the several United States circuit courts of appeals heretofore cited by me, and of the Supreme Court in the *Winsted Hosiery* case, supra.

If there be any doubt in the minds of the committee that the findings and order of the Commission in this case were based upon the preponderance of the evidence, I invite the committee to read the record in this case, printed for the court of appeals and relied upon by counsel for the Commission and for the respondent in support of their contentions before that court.

I may state that the practice is, in the third circuit, not to print the entire record but to call upon counsel for both sides to indicate such parts of the record as they feel should be printed, and I have present here the entire printed testimony, the pleadings, the briefs of counsel for both sides, which I shall be glad to submit to the committee, if any member of the committee is interested in it, to see whether or not in this case, which has been singled out by so many witnesses, the Commission followed the rule of preponderance of evidence in making its findings. And I may state further that yesterday afternoon, after its recess, the Supreme Court heard argument in the *Siegel* case on the petition for certiorari, which was granted the respondent below, and counsel for the *Siegel Co.* stated very clearly to the Court that there was no question about the findings being sustained by the evidence, no question was raised as to the substantiality or adequacy of the testimony and evidence upon which those findings were based and that he was there solely upon the plea that the order of the Commission was too harsh, asking a modification in the Commission's order to permit respondent to continue the use of the trade name with qualification.

How the Supreme Court may decide that question, we do not know.

If it decides in favor of the respondent, it will show that there was an ample and adequate court review, and that the provisions of this bill in that respect are unnecessary.

If it decides in favor of the Commission, it will show that the Commission's findings were based upon competent and substantial testimony.

I submit the printed evidence, consisting of two volumes, copy of the Commission's complaint, its findings as to the facts and conclu-

sion and order to cease and desist, the two opinions of the United States Circuit Court of Appeals for the Third Circuit, and briefs filed by petitioner and counsel for the Commission.

One witness, I think Mr. Hugo Mock, of the New York bar, stated that his criticism of the Commission's procedure is not that it has been too harsh or too strict in protecting the public, but that it has been too slow, and he cited three cases, the Philippine Mahogany, the Arden case, and some cosmetic cases, a group of cases, as supporting his belief in that respect. He claimed that the Philippine Mahogany case had been pending for some 19 or 20 years, I think.

The facts are that the original Philippine mahogany case was disposed of a number of years ago. I will not go into the details of it, because it is a long story, but there was a period of 7 years when there were no proceedings pending. There was a further period of 4 years during the recent war when the proceedings in the reopened case were suspended by the Commission for the very good reason that the Philippine Government, being a party to the proceeding, or rather, appearing as *amicus curiae*, it was not proper that those proceedings should go forward during the war when the Philippine Government could not present its viewpoints fully. A good part of the time therefore, there were no proceedings pending.

I would like, with the permission of the committee, to file a brief statement about these three cases which will show the facts with respect to the time consumed in the trial of them.

(The three cases referred to are as follows:)

A statement was made by one witness that the controversy over the term "Philippine mahogany" has been pending before the Federal Trade Commission and the courts for 21 years. This litigation has been the most protracted in the history of the Commission but the course taken has been unavoidable. The litigation has followed the course outlined below:

A group of complaints was issued in 1925 against concerns using the term "Philippine mahogany" for their Philippine hardwoods. After a trial orders requiring the companies to cease and desist from using the term "mahogany" in any form, were issued on July 19, 1926 (10 F. T. C. 300, 312). Petitions for review were filed in three circuit courts of appeals in 1927. The Commission's orders were affirmed (26 F. 2d 340) and the Supreme Court, on October 15, 1928, denied writ of certiorari (278 U. S. 245).

The controversy was not pending before either the Commission or the courts thereafter for more than 2 years.

In February 1931, however, at the request of certain Philippine lumber producing companies the controversy was reopened by the Commission through the issuance of complaints against a group of new producing respondents. The outcome, in November 1931, was the dismissal of this group of complaints upon a stipulation, received from each company, that it would not use the word "mahogany" for its Philippine hardwoods without using with it the word "Philippine" (15 F. T. C. 439). The Commission believed that the prefix "Philippine" would distinguish the Philippine woods from mahogany and thus prevent deception of the buying public.

For over 7 years, from November 1931 to January 3, 1939, this controversy was not pending either before the Commission or the courts. During the said period, however, three events of importance as to the use of the term in question occurred:

(1) The Supreme Court, in the *White Pine cases* (291 U. S. 67) clarified the "secondary meaning" doctrine, a principle equally applicable to the controversy over "mahogany" and to that over "white pine"; and, in the opinion of some members of the Commission, created a serious doubt as to the soundness of the Commission's dismissal of the second group of cases:

(2) The Congress amended the Federal Trade Commission Act (see 15 U. S. C. A., sec. 45) so as expressly to empower the reopening of Federal Trade Commission orders in all cases where either a change in the law or a change

in the facts or the requirements of the public interest shall, in the Commission's opinion, make it needful to reopen; and

(3) Facts brought to the attention of the Commission led a majority to believe it probable that, although the producing companies were using the term "Philippine mahogany," the retailers of furniture were eliminating the prefix "Philippine" and were selling their Philippine hardwood merchandise simply as "mahogany"; and that the public were deceived despite the said stipulations and dismissal orders.

Accordingly, on January 3, 1939, the Commission reopened the second group of cases, caused additional evidence to be taken, and the cases were briefed and argued before the Commission.

Before a decision could be rendered the war began at Pearl Harbor and Japanese occupation of the Philippine Islands followed. The Commission believed these proceedings should be suspended during the occupation period for obvious reasons. Indeed, during that time no Philippine woods could be imported under any term. This group of cases has recently been reargued and is now pending before the Commission for decision.

MEMORANDUM WITH REFERENCE TO ELIZABETH ARDEN CASE WHICH IS MENTIONED
IN STATEMENT OF MR. HUGO MOCK

This case is one of seven which the Commission instituted against various cosmetic manufacturers for carrying on the so-called demonstrator practices.

Proceedings were commenced in this case on May 15, 1937, by formal complaint charging the corporate respondent with violations of sections 2 (a), (e), and (d) of the Robinson-Patman Act. In addition to the contention that the so-called demonstrator practices were violative of the Robinson-Patman Act, complaint likewise charged this respondent with allowing discriminatory discounts as prohibited by the Robinson-Patman Act.

Hearings were not started immediately in this particular case since there were pending at that time the other cosmetic cases involving the same issues, and hearings had already been started when the complaint was issued in the instant case.

The hearings in these other cosmetic cases had been delayed because after their inception it became apparent that to get the necessary cost figures from respondents' books by the question and answer method would cause an interminable delay; therefore it was agreed that the respondents employ certified public accountants to compile figures from the respondents' books. Adjournment was then taken sine die. This necessitated the cessation of the hearings until the middle of 1938.

Subsequent to the hearings in these other cosmetic cases, the Federal Trade Commission Act was amended in 1938 by including unfair or deceptive acts or practices with unfair methods of competition under section 5 of said act. This resulted in the issuing of amended and supplemental complaints in the instant case and in the other cosmetic cases by including allegations of violation of section 5 of the Federal Trade Commission Act.

Following the issuing of these supplemental and amended complaints, stipulation was entered into with counsel for all of the respondents whereby hearings were to be held only with reference to alleged violations of section 5 of the Federal Trade Commission Act. Insofar as the charges in the complaint related to alleged violations of the Robinson-Patman Act, it was agreed between counsel for the Commission and for all of the respondents that an attempt would be made to dispose of this issue by means of stipulation, it being the feeling of the respondents that such a stipulation could be entered into and thereby save the respondents the expense necessitated by holding of numerous additional hearings regarding this phase of the case.

Following these agreements, consolidated hearings were then held in all of the cases during the summer and fall of 1939 in various cities. Innumerable conferences were involved with the attorneys of all the respondents in a further attempt to dispose of the Robinson-Patman features of the various complaints.

Such negotiations failed, whereupon hearings were again resumed in November 1940 in all the cases and were continued until March 1942.

Shortly thereafter the Commission's attorneys who had had charge of these cases entered into the armed forces of the United States. This necessitated the cases being assigned to another attorney. The transcripts of the hearings of

these various cases contained many thousands of pages of testimony, with which the new attorney for the Commission had to familiarize himself.

The brief of the attorney for the Commission was filed with the Commission in November 1942 and that of the respondent in January 1943. The case was argued before the Commission in April 1943.

The questions involved in determining to what extent the provisions of the Robinson-Patman Act applied to the "demonstrator practices," had to be decided for the first time by the Commission in the instant case. This necessitated the construing of various words in the Robinson-Patman Act. And the Commission gave much time, thought, and effort to the problem before finally issuing its order in 1944.

With reference to the other cosmetic cases, since, generally speaking, they involved the same problem as is presented in the instant case, it was decided that an opinion from a circuit court of appeals should be secured in the Arden case before proceeding with the briefing and arguments in the other cosmetic cases. Obviously this was done as a matter of practical expediency.

DOCKET 1329—ARMAND & CO., INC., ET AL.

June 27, 1925: Complaint issued.

August 31, 1925: Answer filed.

November 30, 1928: Motion to dismiss filed.

January 14, 1929: Order denying respondent motion to dismiss.

February 18, 1929: Hearing, Louisville, Ky. Thereafter hearings held at various places until January 1930 when Commission case closed.

January 5, 1931: Hearing, respondents' case. Completed January 9, 1931.

May 22, 1931: Trial examiner's order closing testimony.

June 24, 1931: Respondent's exceptions filed.

July 23, 1931: Commission's exceptions filed.

October 26, 1931: Commission's brief filed.

February 29, 1932: Respondent's brief filed.

March 23, 1932: Final argument.

January 27, 1933: Order to cease and desist. (Dismissed as to all respondents except Armand Co.)

October 8, 1934: Petition to review filed.

June 7, 1935: Case argued before CAA.

July 8, 1935: Court's decree affirming Commission's order.

July 16, 1935: Order extending time for filing application for rehearing to July 23, 1935.

July 23, 1935: Petition for rehearing filed.

August 2, 1935: Petition for rehearing denied.

November 1, 1935: Petition for writ of certiorari filed.

December 9, 1935: Writ of certiorari denied.

January 11, 1936: Petition for rule to show cause why order vacating or modifying decree of court of July 9, 1935, should not be entered, and for stay of proceeding pending determination on petition, filed.

March 16, 1936: Case argued.

March 25, 1936: Petition for rule to show cause denied.

Thereafter, petition for reargument of motion to vacate filed.

May 11, 1936: Petitioner's notice of motion for reargument of motion to vacate court decree filed.

July 2, 1936: Motion for reargument denied (CCA).

October 1, 1936: Petition for writ of certiorari to review court order of July 2, 1936, denying motion for reargument of motion to vacate or modify.

November 16, 1936: Petition for writ of certiorari denied.

December 10, 1936: Petition for rehearing of petition for writ of certiorari to review court order of July 2, 1936, denying motion for reargument.

December 14, 1936: Denied.

Mr. WHITELEY. Before my closing statement I want to read or cite to the committee two statements, one of them made in a recent book by Mark Sullivan, the well known commentator, certainly not a New Deal Democrat, with respect to the condition that existed at the beginning of this century which resulted in the passage of the Federal Trade Commission Act and the other by the then President of the United States, afterward Chief Justice, a very distinguished citizen,

and the only one who has ever held those two positions at the head of both the executive and judicial branches of the Government, at different times, of course.

In volume 2 of *Our Times—America Finding Herself*, by Mark Sullivan, at page 111 appears the following statement:

The patent-medicine manufacturers made an art of describing the symptoms of diseases in such a way as to terrorize the reader of their pamphlets and advertisements into believing he had one or more of the ailments they pretended to cure; and in describing their cure-alls in terms to convey the conviction of hope.

President Taft, in his message to Congress June 21, 1911, Forty-eighth Congressional Record, part 12, page 675, made the following statement:

Fraudulent misrepresentations of the curative value of nostrums not only operate to defraud purchasers but are a distinct menace to the public health. There are none so credulous as sufferers from disease. The need is urgent for legislation which will prevent the raising of false hopes of speedy cures of serious ailments by misstatements of facts as to worthless mixtures on which the sick will rely while their diseases progress unchecked.

As the result of such opinions and of similar ones held by our legislative and political leaders of the advertising that was going on unchecked, the Federal Trade Commission Act was passed in 1914 to supplement the pure food law then on the statute books.

Later, in 1938, there were amendments passed by the Congress to both acts, the purpose and the effect of which was to strengthen both the Federal Trade Commission Act and the Food, Drug and Cosmetics Act.

And I think those amendments materially strengthened both acts. I think the pending amendments would materially weaken the Federal Trade Commission Act. And if similar legislation were passed amending the Food and Drug Act, it would seriously weaken that act.

It seems to me that the witnesses appearing in support of the pending bill have laid too much emphasis upon the effect the bill would have upon respondents charged with violations of the Federal Trade Commission Act, and have had too little concern with the effect the amendments would have upon competitors and the general public. Indeed, one witness, the general counsel for Johnson & Johnson, manufacturers of surgical dressings, speaks critically of what he terms the Commission's rule in the following language:

The commission's rule with respect to false and deceptive acts and practices is whether the careless, the ignorant, the illiterate, or the foreign-born will be misled, whether a trade-mark has the tendency or capacity to mislead the careless, the ignorant, the illiterate, or the foreign-born. It is not a rule for the wary, or the intelligent, or even the average man.

The witness does too much honor to the Federal Trade Commission when he credits it with the authorship of this rule. As far back as 1910, before the Federal Trade Commission came into existence, in an unfair competition case between Florence Manufacturing Co. and J. C. Dowd & Co., for infringement of complainant's registered trade-mark, the Circuit Court of Appeals for the Second Circuit made the following statement:

It is so easy for the honest businessman, who wishes to sell his goods upon their merits, to select from the entire material universe, which is before him,

symbols, marks, and coverings which by no possibility can cause confusion between his goods and those of competitors, that the courts look with suspicion upon one who, in dressing his goods for the market, approaches so near to his successful rival that the public may fail to distinguish between them. The law is not made for the protection of experts, but for the public—that vast multitude which includes the ignorant, the unthinking, and the credulous, who, in making purchases, do not stop to analyze, but are governed by appearances and general impressions (*Florence Manufacturing Company v. J. C. Doied & Co.*, 178 F. 73, 75).

This statement of the law has been cited with approval in many of the Commission's cases beginning with the case of *Federal Trade Commission v. Balme* (23 F. (2) 615 (decided in 1928)).

Much the same principle was laid down by the Supreme Court of the United States in *Federal Trade Commission v. Standard Education Society, et al.* (302 U. S. 112), in which that court said:

The fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced. There is no duty resting upon a citizen to suspect the honesty of those with whom he transacts business. Laws are made to protect the trusting as well as the suspicious. The best element of business has long since decided that honesty should govern competitive enterprises, and that the rule of caveat emptor should not be relied upon to reward fraud and deception.

It is the duty of the Federal Trade Commission to act in the public interest and to see that the general public and competitors are protected against that small segment of manufacturers and vendors who engage in unfair methods of competition or unfair acts or practices. It is the duty of the Commission to proceed against monopolies, restraints of trade, price discriminations, and similar violations of law in the interest of the honest competitors of such violators. It is the duty of the Commission to proceed against those who falsely represent their goods and wares, those who falsely advertise food, drugs, and therapeutic devices, in the interest of health as well as the pocketbook of the consuming public.

The provisions of this bill would, in my opinion, seriously weaken the provisions of the Federal Trade Commission Act, particularly the provisions of the Wheeler-Lea Act, upon which a subcommittee of the House Committee on Interstate and Foreign Commerce, under the guidance of the chairman of your full committee, and with the assistance and full cooperation of the author of this bill, who was also a member of the subcommittee, labored for many weeks so arduously and successfully. The Wheeler-Lea Act was designed to enable the Federal Trade Commission more fully to protect the health of that large section of the public which has to depend largely upon proprietary remedies. The Commission appreciates the value of and the necessity of such remedies, but it has a serious responsibility to see that the advertising of such remedies is not false, deceptive, or misleading, and to see that a small percentage of the manufacturers and vendors of such remedies be not permitted to take advantage of the consuming public, however gullible or ignorant or credulous the persons deceived may be.

I feel that the pending amendments are not only inadvisable but would be a definite handicap to the Commission in accomplishing the purposes that this committee and the Congress desire accomplished.

MR. SADOWSKI. Thank you, Mr. Whiteley.

Are there any questions?

Mr. REECE. There are two, Mr. Chairman.

It would seem to me as if there are two considerations presented in your statement; one has to do with the propriety and power of the court to modify an order of the Federal Trade Commission, and the other one goes to placing a ceiling upon the amount of the fines that may be imposed against the company for a violation.

Is it your view and the view of the Commission that the courts do have power to modify an order of the Commission?

Mr. WHITELEY. It certainly is, Congressman.

Mr. REECE. Then, how do you account for the statement in the brief which was filed in the Alpacuna case which reads as follows:

Unless the findings and order are either outside the line of evidence or represent abuses of discretion, there is no power in the court to change the findings of an order—

and then again—

it is still contended, we repeat, that the court has no power to modify the order in this case—

and again—

in view of the facts as above presented it is strongly contended that the Court has no power to modify the order in this case.

Mr. WHITELEY. Of course, Congressman, those statements were made with respect to the facts in that particular case, and the facts having been as admitted by counsel before the Supreme Court yesterday, counsel for the Siegel Co., that the record amply sustained the findings of fact made by the Commission, the statements there made under such circumstances, were that there was no power in the court to set aside or to change those findings or to modify an order based upon such findings.

It is implicit, it seems to me, in what was said there that in order for the court to have the power to set aside or modify, you must show that the facts found by the Commission were not based upon substantial evidence, or there must be some question of law in issue.

Mr. REECE. But now let us see the opinion of Judge Hand on the record.

Mr. WHITELEY. May I interrupt you there? This case was decided in the third circuit, not by Judge Hand.

Mr. REECE. That is right, I misquoted.

On the record we doubt whether we should have concluded that the disparaging statements were misleading, but since our effort ends as soon as we find substantial support for the findings, this part of the order must also be affirmed.

Are there not other cases in which the courts have indicated that they do not have the power to modify an order?

Mr. WHITELEY. I think not, Congressman, except where the order is not supported by competent and substantial evidence. I think that the courts have read into the words used in the statute originally that is the word "evidence," the words "substantial evidence" and the words "competent evidence."

Mr. REECE. If there is no evidence, or sufficient evidence, then the court would no doubt rule adversely to the findings of the Commission. That goes without saying?

Mr. WHITELEY. That is correct.

Mr. REECE. But even if there is evidence to support the findings of the Commission, the court might yet feel that the order was too harsh to do justice under all of the circumstances. Would it, in those cases, have power to modify the order?

Mr. WHITELEY. Not if the order were based upon substantial evidence. And if you depart from that rule, you depart from the substantial evidence rule, and you, in effect, grant two trials upon the facts. That is what this bill provides for, which we contend is not only unnecessary but unwise.

Mr. SADOWSKI. Did you wish to answer that question, Mr. Kelley?

Mr. KELLEY. It is a very nice question that is raised.

There can be no answer with any degree of finality, to that particular question, until the Supreme Court decides the Alpacuna case. The Royal Milling case went to the Supreme Court of the United States; it involves the use of the word "mills," where the concerns did not mill in the sense of making flour. In that case, the Commission—there was not any question of the preponderance of evidence, but in applying the remedy, the Commission thought the public could be protected only by taking the word "mills" out of the name.

The Supreme Court, in that case, said, "No; we will modify the order." because in that case there was a question of law involved, and that is always the case for the judiciary.

So they said, "Leave the word 'mills' in your name, but put on it, 'not grinders of wheat.'"

Several years later we had a case go to the Supreme Court that involved a question as to whether certain lumber was white pine. The Commission found that it was not white pine. The Court found that it was not white pine. In that case, the Court said that that was a question for the Commission, it was a factual question. It was like calling a fabric wool when it was cotton. You could not say "white pine" and right under it say "yellow pine." It would be a contradiction. So, in that case, the Court held that it was a matter within the discretion of the Commission.

Now, in this Alpacuna case, I dislike to forecast what the Court is going to hold, but I think they are going to hold that that question as to whether or not the name should go out entirely, or whether or not the Commission thought it could be left qualified and still protect the public interest, was a matter of discretion for the Federal Trade Commission.

If they feel, however, that it was a matter of discretion, that case will stand just as it is. If, however, the Court should feel that it was an abuse of discretion by the Commission, the Court will order mandate down for the circuit court to qualify that name.

It seems to me that what the Court is likely to do in that case is to hold that it was a matter of discretion for the Commission, and they will not disturb it unless they feel that the Commission abused it.

On the other hand, it might be, and when you are forecasting what a court is going to do by listening to the argument, it is pretty hard—on the other hand, they may hold that it is a question of law, that the court has power to modify it. The Court listened intently for 2 hours.

If in the Alpacuna case, the white pine case governs, there will be, probably, one rule.

If the Royal Milling case governs, there will probably be another rule.

And then there are in-between cases where the Supreme Court held on some like questions of Labor Board questions that have come up, that have got to be considered; it is a nice question.

Mr. REECE. Now, then, along the same line, in the Hirschfeld case, and I will address the question to either of you, where the action of the Commission was upheld, the statement of the court, by Judge Hand, reads this way:

It does not follow that the relief granted should extend to an entire suppression of the word "mill," and if we felt ourselves free to control the remedy we might be satisfied to modify the order by merely adding some such suffix as the Supreme Court thought adequate in the Royal Milling case—

and then he goes on—

The petitioners are near enough to being manufacturers to justify their use of the title as it stands provided all chances of deceptions were removed.

And then he goes on to refer to the decision in the Royal Milling case.

The Supreme Court has much circumscribed our powers to review the decisions of administrative tribunals in the point of remedy as they have always been circumscribed in the review of the facts.

Mr. KELLEY. That is right in that particular case, in the cases just like it.

Mr. REECE. If I may just add the rest of the sentence, if you please, such tribunals possess competence in their special fields which forbids us to disturb the measure of relief which they think necessary.

Mr. KELLEY. Yes. There are not many of these cases, but there are three or four, or perhaps two or three, at least, where the court said:

We thought the remedy that the Commission applied was too harsh. We would do it by qualifying the name, but because of decisions of the Supreme Court, we feel that we do not have that power.

That precise question is going to be answered by the Supreme Court when it hands down this Alpacuna case.

Mr. REECE. But my question was, Is it the opinion of the Commission that the courts do have authority to modify an order of the Commission, if it thinks the facts would justify it in so doing?

Mr. KELLEY. Of course, those are nice questions.

The court does not have any power, there is no doubt about that, to reweigh the evidence and arrive at a different ultimate conclusion where the Commission has found, on evidence, otherwise.

Mr. REECE. But, Judge, my question does not go to the right of the court to weigh the evidence, but upon the face of the record submitted to the court, for whatever reason it determines sufficient, thinks an order of the Commission is too harsh to do justice to all parties concerned, then does it have power to modify the order?

Mr. KELLEY. In my opinion, in that particular kind of a case, the Supreme Court is going to hold, when that decision comes down, that the court does not have that power unless the court feels that the Commission abused its discretion.

Whether or not in this Alpacuna case that will be what the court will say, or whether or not they will say that it was one within the discretion and they did not abuse it, or whether they will hold that

the Commission did abuse its discretion, I cannot forecast, but I will say this, these things are pretty difficult; the Commission is trying to balance things and protect the public interest and still not go too far.

I recall a case that came over my desk about a month ago. About 15 years ago, there was a case that came before the Commission with respect to the use of a name, of a company doing business in interstate commerce through salesmen and agents. The Commission found that that name was misleading and deceptive, but they did not prohibit it entirely. They qualified it.

Well, time went on, and just before Mayor LaGuardia left office he had an investigation made. It appeared that there were a number of soldiers, ex-servicemen, who had come back who were induced to sign contracts and make obligations that they otherwise would not have because of this misleading advertising and misrepresentations.

Mayor LaGuardia's office made an investigation, and a very fine investigation, very thorough, and a final report on it. It came down. I do not know what action the Commission will take, but it all goes back that it never would have happened had the Commission at that time required them to eliminate that name entirely.

In this Alpacuna case, and these others cases—they may be wrong in one case; maybe they are wrong in more than one case—but here are some men, five men, who say, "Can we allow that name qualified and still protect the public, or is it necessary because of inherent deception wrapped up in it—must we tell them to eliminate the name in order to protect the public?"

The court, I think, will hold—again I am forecasting—that the Commission would not be disturbed if the court feels that they did not abuse that discretion. I think that if the court at any time finds or thinks that the Commission in so acting did abuse the discretion they will set it aside.

Mr. REECE. Mr. Chairman and Mr. Kelley, in my question it was not my purpose to state whether the court does or does not have that; and certainly not to criticize the Commission in its contention, if it so contends, that the court does not have that. That is a matter which is determined legislatively, whether you do or do not have, then followed by the interpretation of the courts.

And my question did not go to these cases, but to the general proposition of whether the courts, generally speaking, have the right to modify the order.

I want to read again—if you will just wait a moment, please, in view of what you said about the obligation of the Commission to protect the public—the courts have the same obligation, Judge, and in that line, and that would follow my question here—whether the courts have a right, upon review, to modify the order. In this case from which I was quoting, from Judge Hand, in striking a balance between the conflicting interests involved, they—that is, the Commission—for all practical purposes, are supreme.

Then he goes on—I did not see the expression on his face when this was announced, but I think I can see that he may have been a little facetious somewhere in this following sentence:

We do not forget from time immemorial this duty has been entrusted to courts, but that it is irrelevant, Congress having now created an organ imbued with skill which comes of long experience and administrative study, its conclusions inevitably supersede those of the courts which are not similarly so endowed.

Mr. KELLEY. With all due respect—and I am certainly confident that the judge was talking about that case—certainly the courts have got power to set aside or modify any of our orders when they involve a question of law. If, as a matter of law, we go too far, the courts promptly set us back. There is no question about that, but here you are talking—or we are talking—about a peculiar case—let me finish—a man makes a representation; the Commission charges that it is untrue. You take evidence and you find that it is false. Then you come to the remedy. It is false. The question is: Is the Commission going to tell them to eliminate it or continue to use it qualified? That involves a question of judgment.

Of course, the Commission would let him use it if they thought he could use it, and qualify it so as to protect the public.

On the other hand, if they feel that it is of such a nature and a character like calling cotton “silk” or silk “cotton,” that there is only one thing to do—to eliminate it.

Whether or not the courts have power to review an order of the Commission on that character of finding will be handed down by the Supreme Court.

I can only say that as a forecast, and that is pretty dangerous, that if they feel that the Commission's discretion has been abused, they will set that aside. I am inclined to think that they will affirm it, if they find that the discretion has not been abused. However, there is the possibility, and I might say even the probability, that they would say that the court has power to do it irrespective of discretion. I cannot forecast.

There were 2 hours of that very fine point argued yesterday.

It seems to me, however, that the courts will decide it, and it has nothing to do with anything except the question of remedy.

Mr. REECE. If the courts have the power to modify an order, then this provision in the bill giving them that power is without effect.

Is that the way you view it?

Mr. WHITELEY. I would say it is unnecessary. I would not say it is without effect. I think the provision in the bill goes much further than that, because it provides for the review by the court of the evidence.

Mr. REECE. That phase of the bill. If I may just make one more point, Mr. Chairman, with reference to the penalties.

It was my thought that there ought to be some ceiling placed on penalties. I am not at all sure that the amount fixed in the bill is the right amount, but it would seem from your statement, Mr. Whiteley, that you are making the point that the courts are, after all, the agencies on which the respondents must rely for protection in a matter; and I believe that is justified in the statement, in the summary of the cases, which you gave.

In one of those, the amount of the penalties assessed ranged up to \$95,000.

Mr. WHITELEY. Not assessed. The amount of penalties claimed.

Mr. REECE. I misspoke. It was \$95,000, and the court allowed \$500. And then on down in another case, \$30,000, and the court allowed \$500. But in running over the list which you gave me, it appears, by estimating the amount, that the amount of fines claimed in that list was approximately \$1,300,000 and the amount allowed by the court was \$75,000.

It just seems reasonable to believe that where a single offense, we might put it in these days when advertising runs in newspapers and over the radio and over numerous stations, where there might be a hundred or maybe two or three hundred outlets, where the ceiling as now placed in the bill is almost without limit, where a company could be completely destroyed; that there ought to be a ceiling placed somewhere that would not give the authority to the Commission to accomplish an end of that type. However, the courts do have the authority within the limitations prescribed around their authority to review, to protect, the clients from destruction in this way.

Mr. WHITELEY. You understand, in answer to your question, or to your statement that you have just made, that the Commission does not determine that. The court determines the amount of the penalty. The Commission does not have any authority over that determination. The suit is brought by the United States attorney under the direction of the Attorney General, and the Federal district judge assesses the penalty.

Mr. REECE. If I may take one additional minute of the committee's time. In the supplemental statement that you added which was included in your principal statement where you referred to criminal proceedings and injunctions, those are all brought in the Federal courts.

Mr. WHITELEY. That is right.

Mr. REECE. So that they are court proceedings, which, I think, puts them in quite a different standing.

Mr. WHITELEY. My point is that if you place any such limitation, you are just lending encouragement to law violation.

Mr. RABIN. Just a point of information.

In the bill, at the bottom of page 3, last line, there is, "cease and desist after it has become final." At what point does an order become final?

Mr. WHITELEY. The order becomes final in several ways. It cannot become final in less than 60 days after the Commission's order to cease and desist has been served upon the respondent. If, after such service, the respondent for a period of 60 days fails to file a petition to review that order in an appropriate circuit court of appeals, the order then becomes final. If a respondent files a petition to review, the order does not become final until it has been affirmed by the circuit court of appeals. And if a petition for certiorari to the Supreme Court is applied for and granted, until after it has been sustained or the petition denied by the Supreme Court, for a period of 30 days after that. And no penalty can be assessed for any violation in the meantime. It is not until after it has become final that the penalties accrue.

Mr. RABIN. In the Alpacuna case there has been no final order in the meaning of this bill?

Mr. WHITELEY. Absolutely none.

Mr. RABIN. You forgive everything up until the final order, so far as penalty is concerned?

Mr. WHITELEY. If the order becomes final 3 months from now, assuming that the order is sustained by the Supreme Court as it was issued by the Commission, if the respondent obeys that order from that time on, there will never be any penalty proceeding.

Mr. RABIN. You forgive all violation so far as penalty is concerned up to the date of the final order?

Mr. WHITELEY. That is correct.

Mr. RABIN. I do not think anybody can complain about the severity of the penalty under those circumstances.

Mr. ROGERS. I would like to know what is your definition of the difference between the substantial-evidence rule and preponderance-of-evidence rule?

Mr. WHITELEY. I do not think that there is very much difference, Congressman. The difference, so far as the provisions of this bill are concerned, I mean, are whether, after the Commission has made findings based upon the preponderance of evidence, that evidence shall be weighed by the court, by the appellate court, and that is our objection to this provision. It is an objection that, apparently, has been held to be sound by the proponents of the administrative fact-finding bill which is now pending before the Judiciary Committee and upon which years of study have been given.

Apparently, such proponents have come to the same conclusion, that the fact-finding commissions should be the triers of the facts, not the appellate courts.

I can make no distinction, so far as the Commission is concerned, between substantial evidence and preponderance of the evidence.

The Commission has found in all cases before it, so far as I have any knowledge, upon a preponderance of the evidence, and I think that is the only proper way they could make such findings.

Mr. ROGERS. In your opinion and judgment, do you think this phraseology on page 2, lines 22 through 24, or part of 24—

The findings of the Commission as to the facts as supported by the preponderance of the evidence shall be conclusive—

do you think that is a pretty good, sound statement?

Mr. WHITELEY. I would agree with you if that did not necessarily involve the review of those facts, the retrial of the facts by the appellate court. That is the thing to which we object. If you say that these cases shall be decided by the Commission upon the preponderance of the evidence, you then place the duty upon the appellate court to review that whole record and to retry the facts, and that is our objection to it.

I do not think I can add anything to the very exhaustive statements that were made on that subject both by Mr. Kelley and Mr. Wooden, in which I fully concur.

Mr. REECE. May I ask one other question, if it does not delay too much; that is, with reference to the quotations which you made from speeches by Justice Taft and Mr. Mark Sullivan. The conditions referred to in both of those statements were before the Federal Trade Commission Act was passed and even the Pure Food and Drug Act was developed as it is now, to enable that Administration to protect the consuming public. I did not want that to appear in the record without some explanation that it has, as I see it, nothing to do with the question that we are dealing with at this time.

Mr. WHITELEY. That was merely cited, Congressman, as a part of the historical background which showed the necessity for the legislation passed in 1914.

Mr. REECE. The purpose of this bill, insofar as it relates to food and drugs and proprietary medicines, referred to in these statements, is for protecting the public by removing the conflict in jurisdiction and placing the full authority in the Food and Drug Administra-

tion, which has technical facilities for determining the therapeutic value of medicine and issuing appropriate regulations for protecting the public, so that I did not want the purpose of this bill in that regard to be misunderstood.

Mr. WHITELEY. I am not questioning it.

Mr. REECE. I will not question you further on that subject, because I understand——

Mr. WHITELEY. Mr. Cassedy is going into the question of labeling. I am not questioning, may I state, the purpose of the distinguished author of the bill; I am confining myself to the effects of it, and upon that question I will rest upon the statement made by Mr. Paul McNutt, that in his opinion it would seriously weaken the present law.

Mr. REECE. But quote the rest of his statement. If weakening amendments were proposed to the Food and Drug Administration, the result, of course, would be to weaken the act, which, so far as I know, no one contemplates doing. But, anyway, we have here the letter from Dr. Dunbar, the Administrator of the Food and Drug Administration in which he states, very strongly, the view that it strengthens his department rather than weakens it, and which was a more detailed letter written in response to a letter from me requesting an analytical study of the effects of this proposed amendment.

Mr. WHITELEY. I still cannot recede from my position, Congressman, that I think the provisions of your bill seriously weaken the Federal Trade Commission Act. And I will make specific reference to the deletion of the provision requiring the disclosure of the dangerous effects of drugs, and so forth, which was sponsored originally, I believe, by the Honorable Virgil Chapman. He was not in favor of the Federal Trade Commission having jurisdiction over the advertisement, over false advertisements, of food, drugs, devices, and cosmetics. He felt that that jurisdiction should be transferred to the Food and Drug Administration, but he also felt that if the Federal Trade Commission retained such jurisdiction, he wanted to make it as strong as possible. And I think that amendment was written or proposed by him.

Mr. SADOWSKI. Thank you, Mr. Whiteley.

Our next witness is Mr. Cassedy.

Mr. WHITELEY. Would the committee be interested in seeing the record in the Alpacuna case?

Mr. RABIN. I know enough about it now to the extent that I believe I would be able to argue it in the United States Supreme Court.

STATEMENT OF JAMES W. CASSEDY, SPECIAL ATTORNEY, FEDERAL TRADE COMMISSION

Mr. SADOWSKI. Will you state your name and position for the record?

Mr. CASSEDY. My name is James W. Cassedy. I am a special attorney on the staff of the chief counsel of the Federal Trade Commission, and for the past 3 years have engaged in the trial of cases under the provisions of the Federal Trade Commission Act and the Wheeler-Lea amendments thereto.

The purpose of H. R. 2390, better known as the Reece bill, has been stated by the author thereof on several occasions. In substance he states that there is a conflict of jurisdiction between the Federal Trade Commission and the Food and Drug Administration with respect to the regulation of labeling of food, drugs, devices, and cosmetics; that this conflict has grown out of the administration of section 15 (a) of the Federal Trade Commission Act; that section 15 (a) contains the definition of "false advertisement" and expressly excludes "labeling" from it; that the purpose of that exclusion was to prevent dual administration, the regulation of labeling of food, drugs, devices, and cosmetics being under the Federal Food, Drug, and Cosmetics Act and administered by the Food and Drug Administration; and that, either directly or indirectly, the Federal Trade Commission has undertaken to deal with labeling; and that the purpose of the bill is to correct that situation. Mr. Reece has said that he has been held off of this subject for a good while. I want to say before I begin that I am here to discuss that subject as outlined in the statement which I have quoted from one of his former statements and that I am perfectly willing to answer any questions in relation thereto at any time that Congressman Reece, or any member of the committee, desires to stop me.

Mr. REECE. If I may—

Mr. SADOWSKI. Do you desire to make the prepared statement first?

Mr. CASSEDY. I would like to say this—that my prepared statement is approximately 34 pages long, and it is going to take me quite some time to go into all of the details to develop the subject. I am perfectly willing to take all of the time necessary to answer questions; at the same time, I think I shall have answered all of the questions if you will listen to my prepared statement.

Mr. REECE. The only difficulty in a case of long statement such as this, dealing with one phase of a question, is that by the time the witness has concluded the statement, the matters to which your questions relate have become obscured by time.

Mr. RABIN. We have that example in the studies of the Railroad Retirement Act.

Mr. REECE. That is right. And I am wondering what would be the most effective as well as the most expeditious manner of procedure.

I am the last one who wants, in any way, to delay the proceedings.

Mr. CASSEDY. If you will permit me to suggest, I will be very glad to stop my statement and answer questions as we go along. I merely mentioned the length of it so that you would understand I have tried to cover the whole subject. I will hurry as fast as I can.

Mr. SADOWSKI. That is fine. You may proceed, Mr. Cassedy.

Mr. CASSEDY. I wish to direct my testimony to this so-called conflict of jurisdiction arising as it is claimed from the administration of section 15 (a) of the Federal Trade Commission Act and as to the wisdom or necessity of the provisions of the Reece bill in relation thereto. My approach to this matter is solely in the public interest and particularly in the interest of adequate protection of the health of consumers and users of food, drugs, devices, and cosmetics.

Before discussing the amendments proposed by the Reece bill, I wish to point out certain sections of the Federal Trade Commission Act that will be affected by such amendments.

When originally enacted in 1914, section 5 of the Federal Trade Commission Act made unlawful "unfair methods of competition in commerce."

The term "unfair methods of competition" was purposely not defined by Congress, as indicated by the Report of the Senate Committee on Interstate Commerce, which declared—

The committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid their continuance or whether it would by a general declaration, condemn unfair practices, leaving it to the Commission to determine what practices were unfair. It concluded that the latter course would be the better (S. Rept. No. 597, 63d Cong., 2d sess., June 13, 1914, p. 13).

Many types of trade practices have been determined by the Commission and confirmed by the courts to be unfair methods of competition. One of the most common is false or misleading advertising of commodities sold in interstate commerce. Such advertising may consist of false or misleading representations disseminated in newspapers, magazines, radio broadcasts, circulars, circular letters, pamphlets, and in labeling. Such false or misleading representations may be the misrepresentation of an advertiser's business status, misrepresentation as to price, misrepresentation as to origin, misrepresentation as to results the product will achieve, misrepresentation as to approval by the Federal Government, misrepresentation as to the composition of goods, the simulation of a competitor's name, mark, or design, the disparagement of a competitor's product, and misrepresentation in many other forms.

Mr. REECE. If I may take, for instance, a bottle of medicine, under the Pure Food and Drug Act which has the primary responsibility for controlling labeling and misbranding for the purpose of protecting the health of the public, the law requires the label, which is placed on the bottle so as to prevent it being put in a box or rolled in a paper where it is obscured, to give the dosage, and all of the cautions which the Food and Drug Administration feels is required to protect the public.

Does the Federal Trade Commission, under the law as now construed, exercise the authority, directly or indirectly, to control that label and cautions on the bottle?

Mr. CASSEDY. Shall I answer now? I say that the Federal Trade Commission has the right to proceed against any misrepresentation.

Mr. REECE. Does it now exercise the authority where it sees fit to do so to control the label, directions, and cautions which the law requires to be placed on the bottle?

Mr. CASSEDY. You mean as to what should be contained on that label?

Mr. REECE. That is right.

Mr. CASSEDY. It does not.

Mr. REECE. It does not?

Mr. CASSEDY. No, sir. And I differ with all of the statements that you have made heretofore in that regard.

Mr. RABIN. May I ask a further question: Has the Commission ever exercised the right to interfere with what is put on that label in the manner in which Congressman Reece indicates?

Mr. CASSEDY. Your statement is broad, sir, and if you will let me develop it, I will fully answer your question.

Mr. RABIN. All right.

Mr. CASSEDY. I started out on unfair methods of competition under section 5 as it was originally drawn in 1914.

Under that provision, the Federal Trade Commission has the power to prevent any unfair methods of competition, whether the misrepresentation be included in advertisements, such as I have mentioned, or in labeling of commodities.

Mr. REECE. Before you go ahead into the detailed explanation, I would like to.—

Mr. CASSEDY. Permit me to say this: that provision relating to unfair methods of competition and that jurisdiction would be exercised only to stop the dissemination of the misrepresentation. It would have nothing to do with what is contained on the label, except to stop whatever misrepresentation is contained thereon.

Mr. REECE. I was not concerned with the method by which you controlled it, but whether you did exercise control.

I was going to give as an example which you could keep in mind in your discussion of the case; it is this: take, for instance, the Emerson or Bromo-Selzer case; as I understand, the Company work out with the Food and Drug Administration a label which, in its opinion, was proper and adequate to protect the health of the public. And in connection with reaching that determination, the Emerson Co. went to very considerable expense.

Then, after that was done and they had been used with the acquiescence of the Food and Drug Administration, the Federal Trade Commission brought proceedings against the Emerson Co. I do not know whether they are still pending or not. I presume they are. The action was based upon the theory that they must change, extend the labeling beyond what was required by the Food and Drug Administration, or they would be subject to action by the Federal Trade Commission. That was placed as a requirement under the advertising provisions of the act but nevertheless it would appear to be an indirect way of controlling labeling.

It seems to me there is a conflict in jurisdiction here. The same thing is true with numerous other headache remedies. And that is what I wanted to get discussed in a general way. As I see it, that goes beyond the authority which was intended to control advertising.

Mr. SADOWSKI. I think that this question involves the whole subject matter that is going to come up here before us in this presentation.

I think it better if the witness be permitted to present his paper and then a little later have the answers.

Mr. CASSEDY. If you will permit me to interrupt, I will assure you that I will cover that specific point in great detail and that I have with me copies of the complaints in the Miles Laboratories, Inc., the Capudine Chemical Corp. case, the Larned Corp., three of the cases which Mr. Hoge represented the respondents, in which the questions that you present with reference to the Emerson Drug Co., are similar, and I assure you that I know personally about the Emerson Drug Co. case, also, because I am handling that case as well as these in the trials thereof, and that no where in any of the complaints in any of those four cases, does the Commission seek to control labeling. They are based on a failure to disclose consequences of the use of the product

that may result from the use of the product, and the failure to disclose is charged to be in the advertisement under section 15 (a).

Mr. REECE. Bear with me for 1 minute further, for the purpose of getting the issue clarified: You say controls for the purpose of determining whether the therapeutic value of the remedy is what it is purported to be.

Mr. CASSEDY. The complaints are based upon false advertisements, Mr. Congressman.

Mr. SADOWSKI. Suppose you proceed with your statement. Let us get some information from the witness.

Mr. CASSEDY. I wish to proceed, and I will assure you again that that question will be fully covered to your satisfaction.

The jurisdiction of the Commission over such unfair methods of competition has been firmly established by many court decisions and has been limited only by the decision of the Supreme Court in the case of *Federal Trade Commission v. Raladam Company* (283 U. S. 643), to those cases where the existence of competition and injury or potential injury to such competition is alleged and established.

The Wheeler-Lea amendments to the Federal Trade Commission Act, enacted in 1938, left undisturbed the authority of the Commission to act against "unfair methods of competition in commerce" and gave to the Commission the additional power to proceed against "unfair or deceptive acts or practices in commerce," thus avoiding the limitations placed upon the jurisdiction of the Commission by the decision in the Raladam case.

The report of the Committee on Interstate and Foreign Commerce of the House of Representatives, of which this is a subcommittee, in discussing the purposes and intended effect of the clause in the Wheeler-Lea amendment which added the words "and unfair or deceptive acts or practices" to section 5 making such acts or practices unlawful, stated—

The words "unfair methods of competition" in section 5 have been construed by the Supreme Court as leaving the Commission without jurisdiction to issue cease and desist orders where the Commission has failed to establish the existence of competition. In other words the act is construed as if its purpose were to protect competitors only and to afford no protection to the consumer without showing injury to a competitor.

By the proposed amendment to section 5, the Commission can prevent such acts or practices which injuriously affect the general public as well as those which are unfair to competitors. In other words, this amendment makes the consumer, who may be injured by an unfair trade practice, of equal concern, before the law, with the merchant or manufacturer injured by the unfair methods of a dishonest competitor. (H. Rept. No. 1613, 75th Cong., 1st sess., August 19, 1937, p. 3).

In addition to the amendment of section 3 of the Federal Trade Commission Act, the Wheeler-Lea amendments of 1938 added sections 12, 13, 14, 15, and 16 which broadened the jurisdiction of the Commission over the false advertising of food, drugs, devices, and cosmetics.

Section 12 is as follows:

SEC. 12. (a) It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement—

(1) By United States mails, or in commerce by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of food, drugs, devices, or cosmetics; or

(2) By any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in commerce of food, drugs, devices, or cosmetics.

(b) The dissemination or the causing to be disseminated of any false advertisement within the provisions of subsection (a) of this section shall be an unfair or deceptive act or practice in commerce within the meaning of section 5.

That provision is in distinction from and separate from the provision that was already in the act and remained in the act relating to unfair methods of competition.

Section 13 relates to injunctive proceedings to restrain the dissemination of any advertisement in violation of section 12, pending the issuance of a complaint and the conclusion of the case.

Section 14 relates to penalties and, in part, provides:

(a) Any person, partnership, or corporation who violates any provision of section 12 (a) shall, if the use of the commodity advertised may be injurious to health because of results from such use under the conditions prescribed in the advertisement thereof, or under such conditions as are customary or usual, or if such violation is with intent to defraud or mislead, be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not more than \$5,000 or by imprisonment for not more than 6 months, or by both such fine and imprisonment;

Section 15 relates to definitions of terms, including the term "false advertisement," which is contained in section 15 (a), as follows:

SEC. 15. For the purposes of sections 12, 13, and 14—

(a) The term "false advertisement" means an advertisement, other than labeling, which is misleading in a material respect, and in determining whether any advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such condition as are customary or usual. No advertisement of a drug shall be deemed to be false if it is disseminated only to members of the medical profession, contains no false representation of a material fact, and includes, or is accompanied in each instance by truthful disclosure of, the formula showing quantitatively each ingredient of such drug.

Section 16 relates to the certification of cases by the Commission to the Attorney General for penalty action.

The purpose of Congress in the enactment of sections 12 to 16 of the Wheeler-Lea amendments was obviously to afford more adequate protection to the consumer or user of food, drugs, devices, and cosmetics. This purpose was manifested by the report of the Committee on Interstate and Foreign Commerce of the House of Representatives in the following words:

* * * we cannot ignore the evils and abuses of advertising; the imposition upon the unsuspecting; and the downright criminality of preying upon the sick as well as the consuming public through fraudulent, false, or subtle misleading advertisements.

* * * Among the most obvious needs of the Federal Trade Commission Act are those giving more effective control of advertisements affecting the public health and fraudulent impositions as to its food and medicinal supplies.

Mr. REECE. I am in agreement with what you say there that no statements should be made that are in any way misrepresentative, and I think that is what the report of the committee to which you refer there states. Mr. Lea stated that in that report, it will be observed, that it is not mandatory on the advertiser to state anything. The only requirement is in case he does advertise he shall not make statements that are misleading in a material respect.

It is only incumbent upon the advertiser to reveal facts material in light of representations made.

Commissioner Freer made a similar statement when testifying before the Senate committee. And when this bill was up on the floor for discussion, various Members put that interpretation upon it. But what seems to me to have happened is that, as was stated in the Commission's brief in the Dearborn case, when it said, and that it was not intended as a limitation upon the Commission's jurisdiction to suppress false labeling by an order to cease and desist. It seems to me that the Commission has used this device for controlling the label. That is, it determines whether an advertisement is false on the basis of what does appear or does not appear on the label. That is, if the labeling is satisfactory to the Commission, then the advertisement is not false. If the labeling is not satisfactory to the Commission, the advertisement is false. And unless the producer modifies the labeling to comply with the views of the Commission, they issue a cease and desist order. So, after all, the point involved is what is or what is not on the label as to whether it complies with the wishes of the Commission.

I had felt that was not the purpose of the bill when it was enacted. Authority to control labeling was vested in the Food and Drug Administration. And, as Mr. Whiteley or Judge Kelley remarked a while ago, I had an active part in helping to formulate the Wheeler-Lea bill, so as to retain in the Federal Trade Commission jurisdiction over false advertising, but it was then the unanimous agreement among the representatives of the Federal Trade Commission, I think, and of the committee that had jurisdiction of the legislation, that so far as the labeling was concerned and what should go on the label, was placed in the Department of Agriculture, and it was on that basis that we compromised the legislation and gave the Federal Trade Commission jurisdiction over the advertising and the Food and Drug over labeling.

Pardon me, again, Mr. Chairman, I was simply interjecting here for the purpose of trying to get the issue resolved, so that when we discuss it we will discuss it with reference to the matter which, at least, I feel that the proposed amendment deals with.

MR. RABIN. May I ask this—assuming that be so, and assuming the conditions as now exist are undesirable—I have been trying to study section 15 (a) in the law as it now stands, and section 15 (a) as you would change it, to see how you pick that up, how you correct that.

I do not see how this bill corrects it. I see the difference in language, but I cannot see how it corrects it.

MR. REECE. The interpretation of that language by the courts has been such as to give them the authority.

MR. RABIN. I understand that. How would this correct that?

MR. REECE. That takes out the language that by the court's interpretation they were given that authority.

MR. RABIN. After the word "representations" you substitute the phrase "other than" and you say by the substitution of that phrase it will correct that situation? That is what I have been trying to determine.

MR. REECE. That is my understanding and that is also covered with the last sentence in the proposed amendment which makes specific reference to jurisdiction.

I again repeat, I am only interjecting here, trying to get the issue clarified.

Mr. CASSEDY. If you will permit me with respect to that, to answer one or two matters you mentioned in the statement you have just made, if the idea is in your mind that the Commission is exercising some sort of control over what is placed; that is, the wording placed upon a label of food, drugs, devices, or cosmetics, I wish to assure you that the Commission does not exercise any such control and has never exercised any such control.

With reference to the *Dearborn Supply Co.* case and the brief in that case that you mentioned, I would like to state that the brief is not in point and is entirely irrelevant. That case was begun prior to the enactment of the Wheeler-Lea amendments in 1938. The complaint itself in that case was issued before the enactment of the Wheeler-Lea amendments and has nothing to do with section 15 (a). That case is based entirely upon the provision that I first referred to in section 5 that relates to unfair methods of competition.

I wish to further say that that case does not deal with labeling, but with advertising.

It is true there was some discussion of the law relating to the control by the Commission over false advertisements and with relation to the power of the Commission over unfair methods of competition to stop a false representation.

Mr. REECE. I was reading only the Commission's brief as to what the Commission held, its authority there.

Mr. CASSEDY. That is not relevant to the point that you make when you define the issue. I want to say further that the Commission does contend that it was the intention of Congress that the disclosure provisions of section 15 (a) did provide that advertisements should reveal the facts with respect to consequences that may result from the use of the commodity.

And I would say this, from my study and reading of the congressional debates, and I have read every word of them, not once but several times, that the congressional debates and this very report I am reading from right now from this committee indicate and show that that was the purpose of this amendment.

And if I could be permitted to read further from that report, I would like to point out just where it does show that intention. In fact, I am citing it in my prepared statement for the purpose of showing that specific intention on the part of Congress.

Mr. SADOWSKI. That is why I would rather you would proceed with your statement and develop it first, and then, perhaps a lot of these questions will not be so pertinent. You may proceed, Mr. Cassidy.

Mr. CASSEDY. I will continue to read from the report of the Committee on Interstate and Foreign Commerce of the House of Representatives:

The advertisement amendments to this bill revolve around the definition of a "false advertisement" section 15. A false advertisement is defined as one "which is misleading in a material respect." Certain specified matters are to be considered in determining whether or not an advertisement is misleading.

If there could be any question about what was intended, that statement in the report would clear up any confusion.

This definition is very broad. It will be noted that a fraudulent intent is not a necessary element of a false advertisement. The essential elements of a false

advertisement are that it is misleading, and misleading in a material respect. It places on the advertiser the burden of seeing that his advertisement is not misleading.

The definition is broad enough to cover every form of advertisement deception over which it would be humanly practicable to exercise governmental control. It covers every case of imposition on a purchaser for which there could be a practical remedy. It reaches every case from that of inadvertent or uninformed advertising to that of the most subtle as well as the most vicious types of advertisement.

Obviously, a definition to be applied to the infinite variety of advertisements disseminated regarding thousands of different foods, drugs, devices, and cosmetics must be general in its terms. There will be difficulties and uncertainties of interpretation just as there have been in the case of provisions of the Federal Trade Commission Act, the Food and Drug Act, and the antitrust laws, and other laws prescribing in general terms standards of conduct to be applied to innumerable factual situations. These difficulties are inherent in the problem but should not prevent necessary and adequate consumer protection.

It will be observed that it is not mandatory on the advertiser to state anything. The only requirement is in case he does advertise, he shall not make statements that are misleading in a material respect.

It is incumbent on the advertiser to reveal facts material in the light of representations made in the advertisement (H. Rept. 1613, 75th Cong., 1st sess., August 19, 1937).

Section 3 of the Reece bill proposes to amend the definition of "false advertisement" in section 15 (a) of the Federal Trade Commission Act, the proposed amendment being compared with the original act as follows:

I follow, in my prepared statement, with a quotation from section 15 by the side of which I have written the terms of the proposed change so that they will easily be compared:

SEC. 15. For the purpose of sections 12, 13, and 14: -

(a) The term "false advertisement" means an advertisement, other than labeling, which is misleading in a material respect; and in determining whether any advertisement is misleading, there shall be taken into account, among other things) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations.

Present Federal Trade Commission Act

Reece bill

or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual.

so as to prevent deception resulting from indirection and ambiguity, as well as from statements which are false.

No advertisement of a drug shall be deemed to be false if it is disseminated only to members of the medical profession, contains no false representation of a material fact, and includes, or is accompanied in each instance by truthful disclosure of, the formula showing quantitatively each ingredient of such drug.

When the Commission began to issue its orders under sections 12 and 15 (a) in food, drug, device, and cosmetic cases to cease and desist the dissemination of false advertisements that failed to reveal the facts and consequences that may result from the use of those commodities as provided by section 15 (a), I am informed that representatives of some manufacturers of these commodities complained to the Commission that such orders were too harsh in many cases and requested some modification. Conferences were held by the Commission with some of these representatives. One of the representatives, so I am informed, was Dr. F. J. Cullen, the executive vice president of the Proprietary Association of America. Parenthetically, I wish to say that this as-

sociation has a membership made up of most of the manufacturers of proprietary medicines. As a result of these conferences, the Commission, with reference to potentially dangerous food, drugs, devices, and cosmetics, adopted the following policy:

Whenever upon the basis of scientific facts or the consensus of medical opinion, the Commission shall find that a food, drug, cosmetic, or device may be injurious or dangerous to health, and the advertisement of such product claims that it is safe, or fails to reveal the potential dangers in its use, the Commission shall require the respondent to forthwith cease and desist from disseminating any advertisement which represents directly or by implication that its use is safe, and from disseminating any advertisement which fails to reveal the nature of its potential danger: *Provided, however—*

and, Congressman Reece, this will practically cover your point—

That if the directions for use, whether they appear on the label, in the labeling, or in both label and labeling, contain, in the opinion of the Commission, an adequate warning of its potential danger to health, said advertisement need contain only the cautionary statement: "Caution, use only as directed."

I shall discuss that policy and show just what the Commission does with respect thereto as to findings and orders in numerous cases.

I have several here to hand to the committee for your examination.

In the publication known as Food-Drug-Cosmetic Reports, volume 3, No. 34, of October 4, 1941, published by Wallace Werble, editor, whose address is 824 National Press Building, Washington, D. C., certain statements were made regarding the attitude as well as the activity of Dr. Cullen, as follows:

* * * It was apparent that Dr. Cullen did not object to the part of the policy that permits a respondent to include the warnings on the label or in the labeling in lieu of including the warnings in the advertisements. In fact, Dr. Cullen is generally considered to be one of the proprietary industry leaders primarily responsible for Federal Trade Commission granting the right to exclude warnings from advertisements by referring the consumer to the labeling. When Federal Trade Commission originally started thinking about required warnings in advertisements, Dr. Cullen held a number of discussion with high-ranking Federal Trade Commission officials, after which the warning-in-the-labeling policy was formulated.

The attitude and activity of the Proprietary Association is further manifested by another issue of Food-Drug-Cosmetic Reports, Drug and Cosmetic Edition, volume IV, No. 15, of May 23, 1942, long before the Reece bill was introduced, wherein the following statements were made:

Shifting the "heat" from the Food and Drug Administration to the Federal Trade Commission, the year's Proprietary Association convention heard the enforcement activities of the former body described as fair and just, but a whole procession of speakers "tore into" Federal Trade Commission, ending up with a demand by Dr. Robert L. Swain, editor of Drug Topics and Drug Trade News that the Federal Trade Commission Act be amended to require a "preponderance of evidence" to support its orders rather than the present requirement of mere "substantial evidence." Dr. F. J. Cullen, Proprietary Association executive vice president, warned his members that they must be prepared to fight for what they believed to be right in the face of Washington regulatory action, explaining that a "court decree is the only thing some opponents of self-medication understand." Reports read at the convention's scientific session clearly indicated that the industry has been girding itself for future battles over regulatory policy.

The association's general counsel, James F. Hoge, attacked Federal Trade Commission's right to require warnings on labels, or in advertisements, declaring that if Congress had intended to give Federal Trade Commission this power, it would have said so specifically and directly as it did in the Food and Drugs Commission Act.

The only witness who has testified in support of the Reece bill regarding the details of what is said to be a conflict of jurisdiction of the Federal Trade Commission and the Food and Drug Administration was Mr. James F. Hoge, general counsel of the Proprietary Association of America. Mr. Hoge very frankly states at the beginning of his testimony that he appears before this committee as the attorney for this association, which is an unincorporated association, whose membership is made up of manufacturers of so-called proprietary medicines and that the association does not include all of such manufacturers but does include by volume of manufacture most of the manufacturers.

Mr. Hoge argues in substance that section 15 (a) was never intended to be an authority to the Commission to require warnings in advertisements or labels of food, drugs, devices, and cosmetics, but that the Commission is requiring warnings in both advertisements and labels under the authority of that section.

In this connection he said—I think this will draw the issue to your satisfaction by stating fully what he said in regard to that:

* * * I am not speaking of cases in which there may be a dangerous drug; I am speaking of some warning which flags the drug as being per se dangerous; I am speaking, and the Commission has been dealing with warnings which are of a directional nature, warnings which are that the product should not be used excessively, that the product should be used in these circumstances, that the product should not be used in these pathological conditions.

Now, the Food and Drug Act did deal with that subject and the act dealt with it expressly. Section 502 (f) of the Federal Food and Drug Act has a particular provision for that. It is that a drug shall be deemed to be misbranded unless its labeling bears adequate directions for use, and such adequate warnings against use in those pathological conditions or by children where its use may be dangerous to health or against unsafe dosage or methods or duration of administration or application, in such manner and form as are necessary for the protection of the users.

Now, Mr. Chairman, that is an express requirement of the Food and Drug Act, there is no comparable provision in the Federal Trade Commission Act, but under the guise of regulating advertising, the Commission has presumed to insist upon the nature of the warnings which must appear upon the packages of these products on the penalty that if you do not put it on the package as the Commission wants it you must put it in the advertising, so that indirectly the Commission has exercised control over the labeling.

Answering the argument of Mr. Hoge, I wish to first point out that the term "warnings" as used by Mr. Hoge is not to be confused with "facts material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are necessary or usual" as set forth in section 15 (a).

If the "consequences which may result from the use of the commodity" are such that they may injure health, such information could be considered as a warning. But on the other hand, a warning would not necessarily reveal or disclose the "consequences which may result from the use of the commodity."

The provisions of the Federal, Food, Drug, and Cosmetic Act of 1938 illustrate the meaning of "warnings" in section 502 thereof as follows:

A drug or device shall be deemed to be misbranded—

(a) If its labeling is false or misleading in any particular. * * *

(And this is the section Mr. Hoge referred to:)

(f) Unless its labeling bears (1) adequate directions for use; and (2) such adequate warnings against use in those pathologic conditions or by children where its use may be dangerous to health, or against unsafe dosage or methods or duration of administration or application, in such manner and form, as are necessary for the protection of users: * * *

The "warnings" referred to in section 502 (f) (2) are to such effect as "not for use by persons suffering from kidney disease or other pathologic condition," "not for use by children," "do not exceed the recommended dosage," or "do not take more than two doses in any 24-hour period." In other words, the warnings required by section 502 (f) (2) are only the danger signals. They reveal no consequences which may result from use of the commodity and this section does not require such consequences to be revealed in labeling of a drug or device.

The authority of the Food and Drug Administration to require labels of drugs to reveal facts material with respect to consequences which may result from the use of the drug is contained in section 201 (n) of the Federal Food, Drug, and Cosmetic Act of 1938, as follows:

(n) If an article is alleged to be misbranded because the labeling is misleading, then in determining whether the labeling is misleading there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, or any combination thereof, but also the extent to which the labeling fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the article to which the labeling relates under the conditions of use prescribed in the labeling thereof or under such conditions of use as are customary or usual.

I have prepared, as an aid to the committee, and will give to the committee a comparison of section 15 (a) of the Federal Trade Commission Act, with section 201 (n) of the Food and Drug Act, which I think will be of some interest.

(The comparison is as follows:)

Federal Trade Commission Act

Food, Drug, and Cosmetic Act

SEC. 15. For the purposes of sections 12, 13, and 14—

(a) The term "false advertisement" means an advertisement, other than labeling, which is misleading in a material respect; and in determining whether any advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual.

SEC. 201. For the purposes of this act—

(n) If an article is alleged to be misbranded because the labeling is misleading, then in determining whether the labeling is misleading there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, or any combination thereof, but also the extent to which the labeling fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the article to which the labeling relates under the conditions of use prescribed in the labeling thereof or under such conditions of use as are customary or usual.

Mr. CASSEDY. This section [201 (N)] relating to labeling is almost identical with section 15 (a) of the Federal Trade Commission Act relating to false advertisement. This statement is contrary to the

testimony of Mr. Hugh Mock (transcript 152), and in order to demonstrate the similarity of these two sections I wish to file with the committee this copy of both sections written for comparative purposes, on the same page.

MR. REECE. Did the Commission originally construe the language which you quote from the act as giving it authority to regulate labeling, et cetera, and did it so exercise it?

MR. CASSEDY. It does not, and does not so exercise control over labeling. And I will fully demonstrate that to you, Mr. Reece, if you will bear with me long enough.

MR. REECE. Well, you possibly misunderstood my question.

Did the Commission construe that language to give it control over the labeling which it is now exercising over labeling?

MR. CASSEDY. Mr. Congressman, if I could state it this way: The Commission exercises no control over labeling through the exercise of the administration of section 15 (a).

Let me complete my statement, please, sir. The only control, if you call it that, that the Commission has ever exercised was under the unfair method of competition provision of section 5, that is the provision of section 5 that has been in the act since the beginning of the Federal Trade Commission. No control over labeling is exercised by the Commission under section 15 (a), and that is the purpose of my whole argument, to demonstrate that very fact to you, because you have stated that on numerous occasions that the Commission is exercising control over labeling through its application or administration of section 15 (a).

I think I have the issue that you have in mind fully in my mind and I think I can demonstrate my side of it.

A simple reading of these sections will demonstrate their similarity as well as their purpose. These sections were enacted with a broad view of consumer protection against the use of false and misleading advertising, labels, or labeling which fail to reveal and inform the user of the facts material in the light of the representations or of the consequences which may result from the use of the food, drug, device, or cosmetic under the conditions prescribed or under such conditions as are customary or usual. The facts and consequences, if so revealed in the advertisement, label, or labeling, will give the consumer the information he should have in order to adequately protect his health.

In the case of *American Medicinal Products, Inc., v. Federal Trade Commission* (Docket No. 4159, 136 F. (2d) 426; C. C. A. 9, 1943) (Ninth Circuit Court of Appeals), the complaint alleged that the advertisements of a medicinal preparation known as Re-Duce-Oids containing desiccated thyroid, were false, misleading, and deceptive in that they represented that said preparation is a cure for obesity and is a safe, competent, and effective treatment therefor, and failed to reveal the facts with respect to consequences which may result from the use of said preparation. The Commission's order in this case in part ordered that the American Medicinal Products, Inc., and other respondents, in connection with the offering for sale, sale or distribution of their medicinal preparation known as Re-Duce-Oids, do forthwith cease and desist from directly or indirectly:

(1) Disseminating, or causing to be disseminated any advertisement * * * which advertisement represents, directly or through inference, that respondents' preparation Re-Duce-Oids is a cure or remedy for obesity or constitutes a safe,

competent, or effective treatment therefor, or which advertisement fails to reveal that respondents' preparation should only be used under competent medical supervision and that the unsupervised use of said preparation by persons not skilled in the diagnosis and treatment of thyroid conditions may result in serious and irreparable injury to health, and that said preparation is definitely harmful if used by persons having diabetes, goiter, tuberculosis, arteriosclerosis, or coronary diseases, and that the use of said preparation over a long period of time may cause the breaking down of muscular and other tissues, as well as fat tissues, causing irritation of nerve tissue, nervousness, irritability, and increasing heart rate, with possible irreparable injury to health even to a normal individual.

That is the first provision of the order. The other had a similar provision.

Upon appeal of this case to the courts, the American Medicinal Products, Inc., made several contentions, including the contention that the Commission was not empowered to require petitioners to reveal the facts with respect to consequences which may result from the use of the preparation. With respect to these contentions the circuit court of appeals stated (Ninth Circuit Court of Appeals):

There is nothing in any of these points. The order does not require petitioners to reveal anything—

that answers your question, Mr. Reece—

It requires them to cease and desist from disseminating false advertisements, particularly those described in the order, but does not require them to advertise at all. If petitioners do not choose to advertise truthfully, they may, and should, discontinue advertising.

At this point I wish to file with the committee a large number of findings of fact and orders to cease and desist issued by the Commission in cases involving false or misleading advertisements of food, drugs, devices, and cosmetics, which advertisements fail to reveal facts material with respect to consequences which may result from the use thereof.

I invite the members of this committee to examine these findings and orders or to send for and examine the complete records in such cases and they will demonstrate both the necessity and wisdom of the law, which, for the purpose of protecting the health of the consumer or user of food, drugs, devices, and cosmetics, requires the advertiser of such products to reveal the facts material with respect to the consequences which may result from the use of such commodities.

I have numbers of those orders, and it would burden this committee and take entirely too much time to go into them, but I might mention that these orders deal with all sorts of products.

They deal with what we generally refer to as abortifacients; they deal with diathermy and other electrical devices; they deal with a number of obesity remedies; they deal with such cosmetics as hair dyes; they deal with permanent wave preparations; they deal with preparations alleged to stop the liquor habit; they deal with electric devices for removing hair; they deal with preparations for glands and sex organs; they deal with so-called remedies for rheumatism, gout, and arthritis; with so-called remedies for asthma, bronchitis, hay fever; they deal with preparations such as a shaving powder that could be used without the application of a razor; they deal with any and every sort of a preparation. I have tried to get enough in variety so that this committee could see the necessity and wisdom of using this

provision which requires the advertiser to reveal, if he advertises at all, in his advertisements the consequence which may result.

Mr. REECE. While you are on that point, if I may interrupt, you are now discussing the problem about which I have been talking, Mr. Cassedy.

As I understand, the Commission, in its annual report stated that since June 1940, it had issued 61 orders and entered into something over a hundred stipulations.

Mr. CASSEDY. Since when? I did not catch the date.

Mr. REECE. June 1940. Whereby it did, directly or indirectly, prescribe the labeling for the food, drug, or cosmetic. Under the interpretation which you have given, the statute required them to include the labeling in the advertisement, unless they include on the bottle the labeling as directed by you, and in that case, then the advertisement will read, "Caution, use only as directed," and it seems to me by that method you are exercising complete control or exercising control over labeling. It may be an indirect way, but it is exercised.

The question arises as to whether the F. T. C. or the Food and Drug Administration should exercise it. There is no quarrel at all about accomplishing the purpose, Mr. Cassedy, which you say is accomplished by that control but the question arises of having two agencies exercising it. The Federal Trade Commission does not have the laboratories and technical facilities to determine the therapeutical value of drugs. You have two doctors and a chemist, you are without any laboratory facilities at all, whereas we set the Food and Drug Administration up with ample laboratory officials and trained technicians working in cooperation with Public Health and other agencies to determine the therapeutic value.

Mr. CASSEDY. If I may be permitted, with great respect to you, I think you have a had a very definite misunderstanding of what the Commission is doing, and I do not think your statement reflects the policy or the practice of the Commission.

I have read the policy that they follow with relation to advertisements that fail to reveal.

I have pointed out that that policy came about as a request on the part of principally drug manufacturers, including Dr. Cullen, I believe he is still the executive vice president of the Proprietary Association. And if you will read that policy, or read any of the orders issued by the Commission in relation thereto, you will see that the Commission does not regulate or control, either directly or indirectly, anything on the label. They merely provide that where that information referred to is not disclosed in the advertisement, but is contained in the label, then at the option of the advertiser he may use the words in his advertisement, "Caution, use only as directed," in lieu of again stating in the advertisement these consequences that may result from the use of the commodity.

As in the American Medicinal Products case that I read, the facts they failed to disclose are rather lengthy and the very point that these drug manufacturers, including Dr. Cullen, made to the Commission was that, with respect to many, many drugs advertised, for instance, over the radio, to have to recite in every radio advertisement all of these facts that they failed to disclose as alleged and as set out in the American Medicinal Products case, would work great hardship upon

them. So to provide for that hardship, this Commission adopted a very lenient policy which gives to the drug manufacturers the option of complying with the requirements of the Food and Drug Administration; in other words, when they comply with the Food and Drug law relating to the disclosure of the consequences, as set out in section 201 (n) of the Drug Act that I have referred to, if that is being complied with, then there is no necessity of the Commission to require that they again disclose the consequences in the advertisement.

However, I point out to you, sir, that not one of these orders requires the advertiser to put anything on his label and does not refer to the label except as the label exists at the time the order is entered.

If the label, however, is in such form as I have described, then the order provides as referred to in the policy. It gives them the benefit of that policy.

If they do not want that policy, sir, and should want to continue the provisions of section 15 (a) to the strict letter, I would say the answer to it would be to change the policy and require them to reveal the consequences in the advertisement, but the truth about it is, Congressman Reece, they do not want to reveal the consequences either in the advertisement or in the labeling, and that is the bug under this whole chip, in my opinion.

Mr. REECE. I do not know whether that statement is correct. That is a rather comprehensive statement. I am not sure that it also is justified. I am not in a position to say definitely one way or the other, but during the consideration of this whole question, I have never seen anything on the part of the legitimate companies that objected to that. In fact, I think they have all indicated that it is a protection to them to have a provision like that, to have the Food and Drug Administration given such authority.

Mr. CASSEDY. I insist, sir, that is the object of the drug trade, the Proprietary Association, in particular, as reflected by the quotation I made from the Food, Drug, and Cosmetics Report, quoting Mr. Hoge's argument and Dr. Cullen's statements and Dr. Swain's statements. They refer to the specific, identical provisions of this bill that you have introduced, as in Mr. Hoge's argument, that it was not intended to give the Federal Trade Commission the right to require warnings in advertisements. He also says labels, but we have never required warnings to be in labels and do not now.

Mr. REECE. Well, there is no purpose to be served in my belaboring the point.

Mr. CASSEDY. I respect your opinion, but that is just my opinion just the same.

Mr. REECE. I put a different interpretation on what you have just said, possibly, than what you put on it.

Mr. CASSEDY. I appreciate that fact.

Mr. REECE. I believe in exercising control over labels under penalty of cease and desist until they put it in the advertisements, which is an indirect way of doing it.

Mr. RABIN. May I ask a question at this point?

I have read section 15 of the Federal Trade Commission Act paralleled by section 201 of the Food, Drug, and Cosmetics Act, and they are pretty much alike, particularly with respect to the word "consequences." As a matter of fact, is not section 201 of the Food, Drug,

and Cosmetics Act being properly enforced by the Department that should enforce it?

Mr. CASSEDY. I am not in a position to answer that with the completeness that it ought to be answered.

I could point out some instances where I do not think it has yet been enforced, but I realize the handicaps under which the Food and Drug Administration is operating.

I say this, they are enforcing it as rapidly and as fast as they can with the large amount of opposition that they have to meet, because these same drug people that oppose the provisions of the present Federal Trade Commission Act with reference to the disclosures of the consequences in advertising, also object to disclosing them in the labeling.

They claim that section 502 (f) (2) relating to warnings, is the only provision that relates to warnings. They confuse the provisions of the failure to disclose section 201 (n) of the Food and Drug Act with what they call warnings, when I say that failure to disclose facts and consequences is a much broader thing than just a danger sign.

Mr. RABIN. I take it, therefore, that the policy of the Federal Trade Commission in requiring the reference to the labeling in the advertisement, acts as a sort of an expediter, does it not, in the enforcement of section 201?

Mr. CASSEDY. Yes, it certainly does. It merely refers them to the label and that instead of being a conflict with the Food and Drug Administration, it coordinates the two acts.

Mr. RABIN. You give them a choice to either put it on the label or make reference to it, in the advertisement.

Mr. CASSEDY. That is right.

Mr. RABIN. Your control is only exercised over that advertisement?

Mr. CASSEDY. That is right. I have here any number of cases——

Mr. RABIN. That makes it clear in my mind.

Mr. CASSEDY. That go right down that line.

We do not tell them to put anything on the label.

Mr. RABIN. I understand.

Mr. CASSEDY. And will cite further decisions with reference to that specific point.

Of course, Mr. Hodge objects on behalf of the Proprietary Association to revealing these consequences in the advertisements of such commodities or in the labels or labeling thereof because his clients, assumedly, think they might lose some business if the consumers or users of their products knew such facts. Certainly there could be no other reason for their objections to a disclosure of such consequences, for if the truth does not hurt their business, the disclosure of such consequences would certainly make self-medication safer. This law was not enacted to prevent self-medication, nor was it enacted to injure the business of the honest manufacturer. The purpose of the law is to protect the consuming public, the vast multitude which includes the ignorant, the unthinking, and the credulous, who do not stop to analyze.

Mr. Hoge is the only witness who considers the action of the Commission in following its policy with respect to potentially dangerous drugs to be in conflict with the jurisdiction of the Food and Drug

Administration. As a matter of fact it does not conflict in any respect. Such policy merely gives the manufacturer the benefit of his compliance with the Federal Food, Drug, and Cosmetic Act relating to labeling, particularly sections 502 (a), 502 (f), and 201 (n) to which I have heretofore referred.

The same contention that this policy of the Commission is an indirect regulation of labeling was made by Mr. Hoge in the case of *Miles Laboratories, Inc. v. Federal Trade Commission* (140 F. (2d) 638 (C. C. A. D. C., 1944)), in which the circuit court of appeals stated in its opinion:

The Commission denies, and we think correctly, that it is attempting to regulate appellant's labels. All that is said on that subject was to offer that means of correction as a choice which appellant could take or leave as it pleased.

To support his contention that the action of the Commission in following its policy in drug cases is a regulation of labeling, Mr. Hoge cites the case of *Fresh Grown Preserve Corporation v. Federal Trade Commission* (125 F. (2d) 917), *Rigaud v. Federal Trade Commission* (125 F. (2d) 590), and *Charles of the Ritz Distributors Corporation v. Federal Trade Commission* (143 F. (2d) 676). He also quotes from the Commission's brief in the case of *Dearborn Supply Company v. Federal Trade Commission*.

Mr. REECE. In connection with the statement that you just made that there was no conflict; take the Willard Tablet case, as I understand the Food and Drug Administration had a proceeding in that case, and that the court held that the Federal Trade Commission having previously issued an order that it was res adjudicata, and then the court said:

We, therefore, have the incongruous situation of one branch of the Government approving the method now pursued by the claimant, and another branch seeking to condemn. This should be avoided if possible.

Evidently the court thought there was a conflict there.

Mr. CASSEDY. Mr. Reese, that case has nothing whatever to do with the administration by the Commission of section 15 (a). That was an advertising case. That case does not have anything to do with labeling so far as the Federal Trade Commission is concerned. If you will permit me, sir, let me point out this. I will get to that case. I shall discuss Dr. Dunbar's letter in detail, and I will get to that case, but that case is not relevant here to the point that we are now discussing. It has no application at all. It is an entirely different proposition, but I will get to it.

Mr. REECE. Is there not a question of conflict?

Mr. CASSEDY. I have a copy of the decision in my hand. I will get to it in a few minutes.

Mr. REECE. It is not irrelevant.

Mr. CASSEDY. Absolutely.

Mr. REECE. To the conflict in jurisdiction.

Mr. CASSEDY. It has no relevancy to the arguments made by Mr. Hoge that the administration of 15 (a) is in conflict with the Food and Drug Administration. It is on an entirely different subject, as I will point out to you.

Mr. REECE. But it is the subject with which this bill deals.

Mr. CASSEDY. This bill cannot possibly cure it, if you will permit me, with great respect again to your opinion, to say this bill will not

touch the questions raised by the doctrine of res adjudicata. It will not cure the defects pointed out by the Willard Tablet decision, the George H. Lee decision, and another case, the Capon Water case that Dr. Dunbar referred to in his letter.

If you will give me a little time, I will get to those and discuss them in detail.

They deal with another question, not the question of the administration of section 15 (a).

Mr. RABIN. In connection with that section, the policy of the Federal Trade Commission that you enunciate gives to those, shall I say, that do not state unfavorable consequences which may result from the use of the particular product, the advantage of the first sale, does it not; in other words, if from the advertisement itself, the purchaser cannot tell the consequences, they must rely on the label and therefore they must make the purchase first.

If the policy were more stringent they might not buy the first one, is that not so?

Mr. CASSEDY. That is absolutely correct.

Mr. RABIN. So they give the manufacturers of those the benefit of one sale, anyway.

Mr. CASSEDY. It is favorable to the manufacturers of such products. It is not intended to be and, in my opinion is not, a hardship upon them. If they should reveal the facts and consequences in the advertisement as provided in section 15 (a), then for the Commission to excuse them from that requirement is certainly conferring a great favor upon them.

The question of their complying with the food and drug law is another matter, and the Commission does not attempt to require them to put anything in their labels.

Mr. Hoge, in order to support his argument before this committee, cited these cases that I have just named, and these are all of the cases that he cited.

The cases of *Charles of the Ritz Distributors Corporation v. Federal Trade Commission* and *Dearborn Supply Company v. Federal Trade Commission* were both based upon false advertisements of cosmetics and did not involve labeling of these products. The case of *Rigaud v. Federal Trade Commission* was based upon false representations in both advertising and labeling of a cosmetic as an unfair method of competition and had no connection with the failure to reveal consequences referred to in section 15 (a).

I looked that up and I am almost certain that the Charles of the Ritz, Dearborn Company and Rigaud complaints were issued, before the enactment of the Wheeler-Lea amendment, or were invested before the enactment.

As I recall the situation in each of those cases, they were all unfair methods of competition cases.

Mr. REECE. May I interject, also started before the Pure Food and Drug and Cosmetics Act was passed. That is, the present one.

Mr. CASSEDY. Yes, sir. If one applies, the other would apply. If they were started, in other words, before the Federal Trade Act was amended on March 21, 1938, the Pure Food and Drug Act was sometime later during the year 1938.

Mr. REECE. Therefore, started before Congress undertook to adjudicate this question of which agency should have jurisdiction.

Mr. CASSEDY. But the point is, Mr. Hoge has cited these cases to support his argument with relation to the administration of section 15 (a) that was not then in existence.

He says that those cases support his argument that we are dealing with labeling under section 15 (a), and which cases, I say, are not relevant.

The point I make is that the cases are not relevant to the argument that he makes.

Mr. REECE. I cannot agree with you on the statement they are not relevant, neither that Mr. Hoge's argument might not apply.

I am not saying whether it does, but the fact that they were started before the Pure Food and Drug Act and before the Wheeler-Lea amendments were passed, I do not think prevents them from applying. Anyway, the decisions were rendered then.

Mr. CASSEDY. Unless there were some amendments in the complaints, Mr. Congressman, to include the provisions, unless the charges in those complaints were amended in such a way as to base them on these Wheeler-Lea amendments, the amendments would not supply.

The case of *Fresh Grown Preserves Corporation v. Federal Trade Commission* was based upon "false representations in labeling of a food product as an unfair method of competition" and had no connection with the failure to reveal provisions of section 15 (a). In this case, however, it was argued by the appellants that at most they have but labeled their products and that because of the definition of false advertisement in section 15 (a) which excludes labeling, they cannot by so doing have violated the Federal Trade Commission Act. In deciding this question the Circuit Court of Appeals stated:

If they are right, of course, the Commission had no jurisdiction. This argument, however, fails to take due account of two things. One is that the petitioners' conduct as found by the Commission amounted to unfair methods of competition in commerce in violation of section 5 of the act (15 U. S. C. A. 45), and, the other, that the definition of false advertisement in section 15 is expressly limited to that term as used in sections 12, 13, and 14. The courts have repeatedly upheld the jurisdiction of the Commission to prevent unfair competition by means of false labeling and misbranding regardless of the kind of the product—

Mr. SADOWSKI. It is now 1 o'clock and probably we are all getting a little hungry.

I see that you still have quite a few sheets left there in that statement of yours.

Mr. CASSEDY. I have about 10 more pages.

Mr. SADOWSKI. I think we will recess until Thursday morning.

We cannot meet tomorrow because this room will be used in connection with another hearing; and on Thursday the room will also be used for still another hearing, but the clerk informs me that we can use the Rivers and Harbors Committee room for our hearings on Thursday morning.

We will stand recessed until 10 o'clock Thursday morning, and we will meet in the Rivers and Harbors Committee room.

(Whereupon, at 1 p. m., Tuesday, March 5, 1946, the committee recessed to reconvene Thursday, March 7, 1946, in the Rivers and Harbors Committee room, at 10 a. m.)

AMEND FEDERAL TRADE COMMISSION ACT

THURSDAY, MARCH 7, 1946

HOUSE OF REPRESENTATIVES,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D. C.

The subcommittee reconvened at 10 a. m., Hon. George C. Sadowski (chairman of the subcommittee) presiding.

Mr. SADOWSKI. The committee will be in order. We will proceed with the hearings.

The witness is Mr. Cassedy. You may proceed, Mr. Cassedy.

STATEMENT OF JAMES W. CASSEDY—Resumed

Mr. REECE. Mr. Chairman, if I may, before he renews his statement, I would like to call the witness' attention to a statement which I understood him to make with reference to the date on which the Dearborn case was begun.

As I recall, it was the witness' understanding that it was begun before the Food and Drug Act was passed, and I was somewhat chagrined to have been quoting from it the way I was doing if that were the case.

But since the hearing, I have checked up and found that the complaint appears to have been served on September 17, 1938, which was some 6 months after the act was passed.

Of course, I had in mind that if the witness was in error with reference to the date, it was entirely unintentional, but it does become rather important in view of the statements which he made.

Mr. CASSEDY. May I answer that?

Mr. SADOWSKI. Yes.

Mr. CASSEDY. Mr. Congressman, the investigation of that case was begun long prior to the enactment of the Wheeler-Lea amendments. The complaint was issued prior to the enactment of the Wheeler-Lea amendments. [This statment was corrected later.]

The case had been before the Commission for a considerable time before the enactment of those amendments.

Mr. REECE. Well, was not the complaint served on September 17, 1938?

Mr. CASSEDY. I do not have the record of the case with me. I have it in my office and can get it. But I do not think that is material. The case was based, Congressman, on the provisions of section 5 relating to unfair methods of competition, and was not based on the Wheeler-Lea amendments at all.

That case is not relevant when you are dealing with section 15 (a).

Mr. REECE. In looking over the petitioner's brief, which I have here, I find references particularly to section 15 (a), which very clearly

indicates that that section is involved. Otherwise, the attorney for the petitioner was well out in the woods when he was presenting the case.

But I think the point as to when the complaint was served is relevant in view of the reference which I made.

I assumed that there was investigation in advance of the serving of the complaint but the investigation was concluded and the complaint drawn up after the act was passed and in light of the increased powers which it gave the Commission. In that same connection, you were careful in your statement that there was no reference to labeling in the complaint.

Mr. CASSEDY. There is none.

Mr. REECE. That is correct.

Mr. CASSEDY. It is a pure advertising case.

Mr. REECE. That is correct. But when the stipulations were issued, which the company was asked to sign, of which I have what purports to be a copy, it goes on at great length and sets out the labeling and warnings which are required to be used; that is in this stipulation, to be signed by the petitioners. It quotes the labeling and the caution which the Food and Drug Administration has suggested be placed upon the bottle of the product referred to.

Then, the stipulation states that the cautions suggested by Food and Drug are not sufficient and sets out a new labeling and new cautions which must be met if the company signs the stipulation and thereby closes the case.

That is just the point that I was undertaking to make the other day, which evidently you misunderstood, Mr. Cassedy, when that provision was being used to indirectly control the labelings.

In the copy of the stipulation, after quoting the labeling and the warning which the Food and Drug Administration suggested be placed upon this product, this sentence appears in the stipulation:

The caution appearing on the containers in which such products are packaged fails to include a warning to the effect that repeated and excessive use of said drugs may result in mental derangement.

As I stated a while ago, the stipulation goes ahead and sets out the type of labeling and the type of caution which must appear.

Then the stipulation contains a provision that if the labeling which meets the views of the FTC, and the caution, are included, then the advertisement can read: "Caution; use only as directed."

And what impressed me after reading this stipulation was your statement that the complaint did not have reference to labeling, did not reveal the full story which one expects from a representative of a governmental agency when he appears before the committee. Because I do not see how anyone can read that stipulation without coming to the conclusion that the FTC is exercising jurisdiction over labeling and the type of caution that shall be used in connection with the labels. That appears to be the whole purpose of it and it certainly has that effect.

Mr. CASSEDY. Mr. Reece, shall I answer now? I wanted to get the full benefit of your ideas.

Mr. REECE. Well, that completes what I had in mind with reference to that particular case. But in line with the same thing, I refer to the Bromo Seltzer case, and along the same line was the

Miles and the Capudine, and similar cases. You made the same statement in response to my questions there, that nowhere in any of the complaints, in any of the four cases, does the Commission seek to control labels.

Again, that is correct; but what is significant in your statement is that you refer to complaints, whereas that is just the preliminary statement.

The cases themselves, and what is really involved in the cases, becomes significant. Now, Do the stipulations which were drawn up by the Commission in those cases, as in the Dearborn case, and which were submitted to the companies, show that the question of labeling is involved?

Mr. CASSEDY. Mr. Reece, I hope that nothing I have said has caused you to have the idea that the Commission is seeking to conceal anything. Certainly I am not trying to conceal anything, and I am sure the other witnesses are not.

If you bear with me for just a few minutes, I will explain the very points that are now being discussed by you.

Your information with reference to several of these matters is so wrong and incorrect that it is difficult to answer all of your questions as you have asked them.

Mr. REECE. Since you refer to my information being so incorrect that it is difficult to answer: You made the same statement the other day when I referred to the Dearborn case and chagrined me by saying that this case was begun before the Food and Drug Act was passed, whereas the complaints were not made until 6 months after the Wheeler-Lea Act was passed. You likewise stated that that case had no relation, and likewise the Bromo Seltzer and similar cases had no relation, to labeling; whereas the cases, as I have quoted here, do have a very material reference to labeling and cautions.

Mr. CASSEDY. Mr. Reece, if you let me talk I will answer every question you asked.

Mr. REECE. I would like to have them answered now, rather than have you say that you are going to answer them later on.

Mr. CASSEDY. I intend to answer them in detail right now.

Mr. Reece and gentlemen of this committee, with reference to these cases where false advertisement of a food and drug, cosmetic, or device fails to reveal facts material with respect to consequences and that is the basis for the issuance of the complaint, if an order is issued in those cases, the Commission takes into consideration, in view of its policy that I read day before yesterday, whether or not it would require the advertiser or manufacturer to state those facts material with respect to the consequences of use in the advertisement.

If the facts relating to those consequences, material with respect to consequences of use, are then existing in the label, the Commission, as a favor to such manufacturer, and in a lenient manner, has permitted the advertiser to put into his advertisement the words "Caution—use only as directed."

Now, the references in the cases that you mentioned, Mr. Reece, to labeling, had to do with whether or not the label carried the facts material with respect to consequences, and if so then the order would have followed the policy that I read day before yesterday and that I would like to read again.

Mr. Rogers, I see, is present and was not present then, and I would like for each of you to hear it. This is the policy of the Commission, which has been in existence since 1941, sometime about October 1941.

There was a slightly different policy prior to that time, that these drug people complained about. The policy now reads:

Whenever upon the basis of scientific facts or the consensus of medical opinion the Commission shall find that a food, drug, cosmetic, or device may be injurious or dangerous to health, and the advertisement of such product claims that it is safe or fails to reveal the potential dangers in its use, the Commission shall require the respondent to forthwith cease and desist from disseminating any advertisement which represents directly or by implication that its use is safe, and from disseminating any advertisement which fails to reveal the nature of its potential danger: Provided, however, That if the directions for use, whether they appear on the label or in the labeling, or both in the label and labeling, contain, in the opinion of the Commission, an adequate warning of its potential danger to health, said advertisement need contain only the cautionary statement, "Caution; use only as directed."

Now, I filed with this committee a large number of orders. About half of them required the advertiser to reveal the consequences of use in the advertisement. The other half of them permitted, in lieu thereof, at the option of the advertiser, to put "Caution; use only as directed" where his label carried the same information.

Now, that is the policy that has been followed, and I filed those orders for the benefit of the committee. There has never been at any time any order of this Commission directing any manufacturer of these commodities to put anything on a label. Those orders do not so provide and that policy does not so indicate. Those cases, every one of them, that you mentioned that dealt with labeling in any way, dealt with it in view of the policy that was adopted at the request and instance of these drug people, including the proprietary association.

Mr. REECE. I will agree what you are saying is what I interpret as the method by which the Commission is controlling the labeling and making a determination of the therapeutic value of the product which is comparable to the work which the Food and Drug Administration is doing and a duplication of it.

Mr. RABIN. Would you yield at this point, Mr. Reece? Is there not substantial agreement on the facts? I think there is no difference between what we understand and what Mr. Cassidy sets forth: That the Commission directs its activities against advertising. Now, if the advertiser wants to put a statement of all those consequences in the ad, then the Commission does not care what he puts on the label.

On the other hand, if he does not want to put it in the ad, and he wants to substitute those words "Use only as directed," then the Commission says if you want to do that, it must be on the label.

The facts I think we all understand, but on the conclusions I do not think we will ever come to an agreement. We here may conclude that that is controlling the use of the label. The Commission thinks otherwise. But I do not think it will serve any useful purpose to contest conclusions.

Mr. REECE. I think that is right.

Mr. RABIN. The facts are clear, I think.

Mr. REECE. The only purpose I had in bringing it up at this time, Congressman, was to clarify the explicit statements which the witness made on the previous appearance, that the Commission did not deal with labeling.

Mr. RABIN. That, too, was a conclusion.

Mr. REECE. Yes; that is right.

Mr. RABIN. We may call it dealing with labeling. In fact, I may go along with you on that.

Mr. REECE. But I want the record amplified.

If I may ask, When did the Commission begin to exercise this type of jurisdiction which you are now describing, whether we refer to it as labeling or advertising, or what not?

Mr. CASSEDY. You mean following this policy that I have just read? Mr. REECE. Yes.

Mr. CASSEDY. As I understand it, we first began to require the advertiser or manufacturer to reveal the consequences in the advertisement shortly after the enactment of the Wheeler-Lea amendments. But I might add this: That it has been considered by many good authorities that the failure to reveal consequences relating to these products that are involved here may be considered as an unfair method of competition.

Mr. REECE. Yes; I understand that.

Mr. CASSEDY. Now, in the Raladam case that was mentioned, the second Raladam case, that went to the Supreme Court of the United States, which decision I have here if you care to look at it, the question was not specifically presented as to what authority the Commission had, but that case was based upon a failure to reveal the consequences; consequences of use with respect to a so-called obesity remedy. That was the basis on which the advertisement was attacked.

Mr. REECE. When did you come with the Commission?

Mr. CASSEDY. In March of 1943. I have been there three years.

Mr. REECE. After the Wheeler and Lea Act and Food and Drug Act were passed. And of course, Judge Kelley is the chief counsel. I was interested in knowing, and I do not want to embarrass the judge, because I appreciate the various positions people occupy within the Government service, whether he was in full agreement with the operations which you have described. My interest in that arose in part out of our relationships back at the time this legislation was being proposed. Have you ascertained whether Judge Kelley's views are fully in accord with the views which you are expressing?

Mr. CASSEDY. Yes, sir; and so are Judge Davis', and when Judge Davis testifies, I am sure that he will explain this again in almost the same way that I am now explaining it to you.

Mr. REECE. I am sure that the judge has that view.

Mr. CASSEDY. There is no other interpretation.

Mr. REECE. Judge, are you fully in accord with the views that have been expressed with reference to labeling by the witness?

Mr. KELLEY. I think generally, yes. Now, there are a lot of these cases, you know, that might not be too easy. They may be borderline cases. But let me state it generally:

I do not think the Commission has jurisdiction under the Wheeler-Lea amendment as to the labeling, except perhaps in cases of aid of the Food and Drug Administration's jurisdiction where it might not have it.

However, the courts have held, and I do not think there is any question at all that the Commission has jurisdiction to correct improper advertising as an unfair method of competition, under section 5 of the Federal Trade Commission Act.

Now, these things overlap somewhat. The Commission had a number of cases involving improper names and improper branding on cosmetics and perfumes. As an illustration, there might be a perfume that is compounded in New York City and sold to the public with the name "Paris." Now, the Commission took the position that the public should be protected against the use of the word "Paris" and "France" where the perfume was made in New York; also that perfumes that were compounded in France should receive protection.

In that kind of a case, it seems to me that that is essentially an unfair method of competition case under section 5 of the Federal Trade Commission Act.

I would not want to say that it could not also be attacked under the food and drug law. But the Food and Drug people are essentially dealing with different things, and while they might deal with that under the misbranding section of the Food and Drug Act, primarily that kind of a misbranding is, in essence, an unfair method of competition.

The courts have said so since the day the Commission was created.

Mr. RABIN. Nothing dangerous to life or health in branding it "Paris," as against "New York," and the Food and Drug Act perhaps will not be prone to prosecute in a case of that kind?

Mr. KELLEY. Yes. There may be questions also of the character and kinds of unfair methods of competition involved. I do not think it is the policy of the Commission to issue a complaint involving a label under the jurisdiction of the Pure Food and Drug, that falls within the Wheeler-Lea amendment. The Commission did, I think, in one or two cases, at the instance of the Food and Drug Administration.

That was the only case I know of, I think, of a simon-pure label case, and that was brought at the instance of the Food and Drug, because they lost the case.

But I do not think we are going to get any place here by picking out and talking about an isolated case. The Federal Trade Commission has jurisdiction of a food, drug, and cosmetic matter with respect to an honest-to-goodness method of unfair competition where the public needs protection.

And the public interest is of prime and first importance there. Now, with respect to advertising, under the Wheeler-Lea amendment, the Federal Trade Commission has the duty and has to administer that law in the interest of the public; not as to labeling but advertising.

The Commission is not getting into labeling, any more than the Food and Drug is getting into advertising.

Now, I do not want to say that the Food and Drug had not gotten into a situation in one or two instances where the question sharply arose and the court had to decide whether it was labeling or advertising. Of course. And the courts have handled that. And consequently we are going to get to where the courts are going to have to draw the line. If we get set back, all right. It is a yardstick.

But generally speaking and primarily, we are attempting to not overlap where one will interfere with the other. I never saw a policy where the Commission was going ahead into labeling under the Wheeler-Lea amendment, because I do not think they have jurisdiction under the Wheeler-Lea amendment with respect to simon-pure labeling, ex-

cept perhaps in an instance that might arise where the Food and Drug did not have it and we aided them in their jurisdiction.

I do not know that I have made myself plain.

Mr. SADOWSKI. Very clear, sir.

Mr. REECE. After the committee recessed on the day when Mr. Hoge appeared, as I understood, I heard you remark at that time that the statement which Mr. Hoge made with respect to labeling was a fair statement.

Mr. KELLEY. I do not recall. I was intent on listening to Mr. Hoge on what he had to say against preponderance of the evidence. And I answered that as best I could. No, I do not think I made that statement, because I would not be in a position to do that.

I have not really read his statement with respect to labeling.

Mr. REECE. That of course is immaterial.

Mr. SADOWSKI. You may proceed, Mr. Cassedy.

Mr. CASSEDY. I would like to state to Congressman Reece, as well as to the other members of the committee, regarding Congressman Reece's interpretation of our policy, and practice under that policy, with respect to section 15 (a), as to whether or not that deals with labeling: The Circuit Court of Appeals for the District of Columbia, in the Miles Laboratories case, that I read the day before yesterday, has decided just to the contrary of his view in these words:

The Commission denies, and we think correctly, that it is attempting to regulate appellant's labels. All that is said on that subject was to offer that means of correction as a choice which appellant could take or leave as it pleased.

Mr. REECE. No; I correctly understood the decision, but I construed the effect of it to give the Commission authority, which I am not disputing, by this method to control labeling. It becomes wholly an impracticable matter in all types of advertising to include the label and the caution, so that they have no other alternative if they are going to advertise.

Mr. RABIN. I think the question before the committee now is to consider whether that type of control, regardless of what you call it or to what degree it is exercised, is in the public interest.

Mr. REECE. Yes, that is the point. I wish the witness would be a little more conservative in his statement, saying that I misunderstood and that I had the wrong impression and the wrong conception, because there is not any misunderstanding, as Mr. Rabin says. We are talking about the same thing. I admit the Commission has the authority. The only question is one of determining where this authority should now rest, since the court's interpretation of the act gives the Commission joint authority over labeling with the Food and Drug Administration.

Mr. CASSEDY. I would like to differ with you, Mr. Reece, as to what the courts have interpreted with reference to the act. I will cite to you the case of Fresh Grown Preserve Corp. versus the Federal Trade Commission, one of the cases which Mr. Hoge cited, to the effect that it supported his argument that we were dealing with labeling under section 15 (a).

I cite this case to just exactly the contrary purpose, to show that we are not dealing with labeling. Now, let me point out to the committee: That case was based upon false representations in labeling of a food product as an unfair method of competition, and had no connection with the failure to reveal provisions of section 15 (a).

I want to say that that is the case Mr. Kelley just mentioned, that the Commission instituted shortly after the enactment of the Wheeler-Lea amendments in 1938, at the specific request of the Food and Drug Administration, after they had lost their case against the same respondent.

We proceeded in that case, and an order was issued, and that order was upheld by the circuit court of appeals. That was a case in which the Commission sought to prohibit the dissemination of the false representations in the label as an unfair method of competition under section 5, and had nothing to do with section 15 (a), had nothing to do with directing what this respondent should put on his label.

In this case, it was argued by the appellants that at most they have but labeled their products, and because of the definition of false advertisements in section 15 (a), which excludes labeling, they can not by so doing have violated the Federal Trade Commission Act.

In deciding this question, the circuit court of appeals stated, "If they are right, of course the Commission had no jurisdiction." In other words, on that argument, the same argument, as I understand, that Congressman Reece is making, if they were right we had no jurisdiction in this case.

This argument—

further quoting the court—

however fails to take into account two things. One is that the petitioner's conduct as found by the Commission amounted to unfair methods of competition in commerce in violation of section 5 of the act; and the other, that the definition of "false advertisement" in section 15 is expressly limited to that term as used in sections 12, 13, and 14. The courts have repeatedly upheld the jurisdiction of the Commission to prevent unfair competition by means of false labeling and misbranding, regardless of the kind of product. * * *

The amendment to section 5 of the Act did not modify the term "unfair methods of competition in commerce," but made unlawful what were called "unfair or deceptive acts or practices in commerce," and by so doing enlarged instead of lessened the scope of the jurisdiction of the Commission. The additions found in sections 12 to 15, inclusive, were also to give the Commission greater control over the advertising of foods, drugs, cosmetics, and the like, by providing for criminal action, as well as injunction, and only in proceedings under such sections is the definition of false advertisement in section 15 relevant; not in a proceeding like under section 5.

Now, I think there could be nothing clearer. In the Miles Laboratories, Inc., case, Mr. Hoge instituted a declaratory judgment proceeding in the district court, seeking a declaration as to the limits of the Commission's authority to dictate and control the contents of appellants' labeling and advertising.

It was insisted by Mr. Hoge that the action of the Commission in demanding that Miles Laboratories include in its advertisements or, at its option, on its labels, a statement to the effect that excessive use of the medicines may result in mental derangement or collapse or dependence upon the drug, is wholly beyond the power of the Commission.

The court held that it had no jurisdiction to enter the declaratory judgment which Mr. Hoge sought to obtain for his client. Since the decision in this case, the Federal Trade Commission has issued its

complaint against Miles Laboratories, Inc., in which it has alleged, quoting from the complaint:

Respondent's advertisements of and concerning its Liquid Nervine and Nervine Tablets—

and with respect to those products, Nervine contains the drug called bromide, that I want to take up a little later—

constitute false advertisements within the meaning of the Federal Trade Commission Act for the further reason that they fail to reveal facts material in the light of the representations therein contained and material with respect to the consequences which may result from the use of said preparations under the conditions prescribed in said advertisements, and under such conditions as are customary and usual.

The same allegations were made concerning its preparation called Anti-Pain Pills which contain acetanilid. The complaint alleges that the Nervine preparation may cause skin eruptions and mental derangement, while the Anti-Pain Pills may cause dependence thereon, blood disturbances, and collapse.

This case has been partially tried. In another proceeding, Mr. Hoge represents the Capudine Chemical Co. against whom the Commission has issued a complaint based upon the failure of the advertisements to reveal the facts and consequences which may result from the use of a medicinal preparation known as Capudine. It is alleged that this preparation may cause skin eruptions, mental derangement, and serious blood disturbances. And I wish to say that that preparation contains bromides.

This case has also been partially tried.

Mr. RABIN. Excuse me. What do you mean by "partially tried?"

Mr. CASSEDY. The trial has not been completed. The Commission has not finished putting on its testimony.

Mr. RABIN. Is it in the Federal court?

Mr. CASSEDY. It is before the Commission.

Mr. RABIN. Before the Commission. All right.

Mr. CASSEDY. Yes, sir. And I might add that I am trying the case for the Commission. Mr. Hoge is the attorney for the respondent, in all these cases.

Mr. RABIN. Therefore the question which would have been raised by Mr. Hoge in his application for declaratory judgment had the court entertained jurisdiction, has not been decided in these cases?

Mr. CASSEDY. No; but it has been decided in the Miles Laboratories case. Certiorari was denied in that case by the Supreme Court.

Mr. RABIN. On the grounds of no jurisdiction?

Mr. CASSEDY. That is right.

Mr. RABIN. But it did not go to the merits?

Mr. CASSEDY. That is right. In another case, Mr. Hoge represents the Larned Corp., in which it is alleged that the advertisements failed to reveal facts and consequences which may result from the use of a medicinal preparation known as Hill's Cold Tablets, which contains acetanilid. I am pointing out that these preparations contain acetanilid and bromides, because I want to refer to that matter again. It is alleged that this preparation, Hill's Cold Tablets, may cause dependence upon the drug acetanilid, and may cause collapse. This case has been partially tried.

In each of these cases Mr. Hoge contends before the Commission that section 15 (a) does not give the Commission authority to require

the advertisers of these products to reveal in advertisements the facts and consequences.

It will be noted that in his testimony before this committee he implied he admits that the Commission does have such authority.

Of course, Mr. Hoge is incorrect in his contention before the Commission, and his argument in support of the Reece bill admits it, because there would be no necessity, even from his view, to amend section 15 (a) in order to take away from the Commission authority it does not have.

In supporting the Reece bill, Mr. Hoge is certainly not an impartial witness, for the passage of this bill would take this authority from the Commission, and Mr. Hoge would win these cases.

Now, Mr. Reece, with respect to the points I have made about your misinformation, I would like to point out that when you stated at the beginning of my testimony something with reference to the Emerson Drug Co., the Bromo-Seltzer case, you stated this, if the reporter has you correctly reported, reading from the first draft of that report:

What I was going to give as an example, and which you could keep in mind in your discussion of the case is this: Take, for instance, the Emerson or Bromo-Seltzer case. As I understand, the Food and Drug Administration decided upon as at least suggested a label which in its opinion was proper and adequate to protect the health of the public, and in connection with reaching that determination the Emerson Co. went to a very considerable expense.

It was thoroughly discussed and adjudicated with the Food and Drug Administration. Then, after that was done, the Federal Trade Commission brought proceedings against the Emerson Co. I do not know whether they are still pending or not.

I presume they are. That was based upon the theory that they must change, extend the labeling, beyond what was suggested by the Food and Drug Administration, or they would be subject to action by the Food and Drug Administration.

That was placed as a requirement.

That completes the quotation from Mr. Reece's statement with regard thereto. I wish to say that the Emerson Drug Co. case is pending before the Federal Trade Commission. I have here several copies of the complaint in that case that I wish to file with the committee. This case is similar to those that I have referred to, the Miles Laboratories, the Capudine, and the Larned Co., in that it is based upon the failure to reveal the consequences of use under section 15 (a) and the failure to reveal being charged as not disclosed in advertising.

This case is not based on labeling in any respect. I also wish to file with the committee a copy of the complaint in the Larned case, which involves Hill's Cold Tablets and a copy of the complaint involving Capudine.

MR. REECE. Have stipulations been drawn up in those cases?

MR. CASSEDY. No stipulations are in those cases.

MR. REECE. But I think it would be of value to the committee if we had copies of your stipulations.

MR. CASSEDY. There are no stipulations. These cases are being fought out on the merits.

MR. REECE. Do not get too impatient, please. I want you to know that I was not referring to stipulations in those cases, but samples of stipulations in cases where stipulations have been drawn up, in similar types of cases, so that the committee would have the value of the information which the stipulations might contain.

Mr. CASSEDY. I would be glad to furnish them to the committee in great number. They follow the same policy of the Commission.

Mr. REECE. I hope you do not construe——

Mr. CASSEDY. No, I ask your pardon for my seeming impatience.

Mr. REECE. With those stipulations, if you do not mind, I wish you would also include the stipulation drawn up in the Dearborn case.

Mr. CASSEDY. Yes, sir.

Mr. RABIN. Mr. Reece, I think it would be well to have a typical one of that kind in the record.

Mr. REECE. Yes. I have what purports to be a copy of the stipulation in the Dearborn matter.

Mr. ROGERS. Mr. Cassedy, let me ask you this question, before you go to another thought: In these cases which you have just discussed, you made the remark that if this bill were passed, Mr. Hoge would win the cases?

Mr. CASSEDY. Yes, sir, that is correct.

Mr. ROGERS. Now, if he did win the cases, would the Food and Drug Act have jurisdiction to settle these questions which you have raised in these suits?

Mr. CASSEDY. Insofar as it concerns advertising, they would not. They would be limited to the requirement that the labels reveal these consequences as required by sections 502 (f) and 201 (n) of the Food and Drug Act of 1938 that I quoted on day before yesterday, Mr. Rogers, while you were not present.

It is in my written testimony.

Mr. ROGERS. What can you say as to the relief afforded the public under the present law, as differentiated from that which would be afforded if this Reece bill were passed?

Mr. CASSEDY. I am sorry you were not present on day before yesterday, so that you could have heard a complete statement, but in short, I will state it this way: The authority of the Federal Trade Commission with respect to false advertisements of foods, drugs, cosmetics, and devices, comes from sections 12, 13, 14, 15, and 16.

Section 15 (a) defines "false advertisement," and that definition, according to Mr. Reece's bill, would be amended by deleting therefrom the requirement, or rather the provision, relating to an advertisement revealing the facts material with respect to the consequences of use of those commodities.

I am trying to answer your question as quickly as possible and yet cover what you had in mind. Similarly in the Food and Drug Administration they have section 201 (n) of the Food and Drug Act of 1938. I filed with the committee on day before yesterday copies of both of those acts written on the same piece of paper, side by side, so that you could see the similarity. 201 (n) of the Food and Drug Act refers to labeling that fails to reveal consequences of use of a product. In addition to that provision in the Food and Drug Act, they have also 502 (f), which relates to the directions for use on a drug or device, and relates to warnings on the label of a drug or device.

Mr. O'HARA. Mr. Cassedy, could I interrupt you there?

Mr. CASSEDY. I just wanted to satisfy Mr. Rogers.

Mr. O'HARA. I noticed that you characterized Mr. Hoge, as to his testimony, and I have forgotten which one of the witnesses he was, as not being an impartial witness.

I do not remember that any witnesses who testified have claimed that they were impartial. They each were testifying with respect to their views of it. Is that your claim? Do you claim to be an impartial witness?

Mr. CASSEDY. Mr. O'Hara, I believe that when you act in the public interest you have a greater impartiality than when you act in a private interest.

Mr. O'HARA. I might differ with you on that. I think we all are prejudiced, consciously or unconsciously, by the side we happen to be on.

Mr. CASSEDY. I realize that such thing as a prejudiced interest may occur without our realizing it. At the same time I feel strongly that the consequences of use should be in an advertisement or in a label when you deal with drugs and foods, devices, or cosmetics, because they deal with the very health of every one of us and the whole public.

Mr. RABIN. On this point, with reference to the statement made as to Mr. Hoge's appearance before the Commission, of course, you and I agree that an attorney has a right to urge any defense that his client may have.

Mr. CASSEDY. Of course he has.

Mr. RABIN. Mr. Hoge, certainly, has a right to assert that the method of operation of the Commission really violates section 15, in that the Commission does control labeling. Now, I understand that the courts have held the other way. He has a right to assert it, anyway, and claim the court is wrong.

It is not inconsistent for him to urge one thing in the Commission in the interests of this client and then come here and say: "If I am wrong on that, I would like the law changed."

Mr. CASSEDY. I respect the other lawyer's viewpoint and any person's viewpoint even though it may differ from mine, but in this instance, I think the criticism that Mr. Hoge has made and Mr. Reece has made, including the introduction of the bill, is directed against a policy of the Commission rather than the law.

In other words, the law requiring the revealing of consequences in the advertisement in my opinion should exist and should not be changed; because, as I pointed out to Mr. O'Hara, I think it is necessary to protect public health, but the amendment would take that away. Now, if the Commission has followed a policy with respect to labeling that is wrong or improper, that is a matter of policy of the Commission, and I am just one of the employees down there. Judge Davis can speak for the policy of the Commission.

Mr. RABIN. The Commission can very easily correct that policy but it would be to the detriment of the advertisers.

Mr. CASSEDY. Personally, I think that would help protect public health, but it was at the instance of these drug people that this policy was adopted.

Mr. REECE. Mr. Chairman, did I or did I not understand that the stipulation had been drawn to cease and desist in the Miles case?

Mr. CASSEDY. Mr. Reece, let me make this explanation: Whenever a case is begun, begun by investigation, and before complaint is issued, the Commission usually, in most cases, offers the respondent an opportunity to settle that case by stipulation. In so doing it prepares a written form of stipulation in numerous copies and sends those to the respondents, which they can accept or not. That is their right. They

do not have to accept it. And those matters come up before the issuance of a complaint. Now, the trial attorneys do not deal with that type of a stipulation at all. Sometimes after a complaint is issued, a trial attorney may stipulate with the attorney for respondent what the facts are in lieu of taking the testimony.

Mr. REECE. But then possibly I misunderstood you. A few moments go I referred to the fact that I understood that a stipulation had been offered. Then I understood you to imply that in none of these Bromo-Seltzer cases, bromide cases, and comparable cases, had the stipulations been drawn up.

Mr. CASSEDY. I meant since the issuance of a complaint.

Mr. REECE. Now, Mr. Chairman, I think the witness made a good statement that samples be offered. As far as I am concerned, one sample is sufficient. We have here what purports to be a mimeographed copy of the complaint in the Miles case, and then a copy of the stipulation.

Would it be all right for those to go in the record?

Mr. SADOWSKI. I was going to ask Mr. Cassedy: You have submitted here four or five complaints in four or five various cases. I do not think it is necessary to put them all in the record. Which one of these would you like to put in this record?

Mr. CASSEDY. I would like to put all of those in the record, particularly because they are Mr. Hoge's cases. Mr. Hoge was the only witness who had testified with regard to the policy or the procedure of the Commission under section 15 (a), which he claims was regulating labeling.

In that respect, I wanted those cases to be on file.

Mr. REECE. In order to conserve space, then, how would it do to have printed in the proceedings one sample copy, and have the others filed in the committee by reference? I would suggest, as to those that are filed, that the stipulations which were drawn up be filed in connection with them?

Mr. O'HARA. Mr. Chairman, in that connection, I do not know what purposes they serve. Of course, oftentimes in these cases, Mr. Cassedy, I suppose complaints are made in which either a stipulation is made, or they are convicted under the charges, or some of them are proven and others not proven?

Mr. CASSEDY. As in all cases tried in court.

Mr. WHITELEY. Mr. Chairman, may I make a brief statement to clear up the matter that Congressman Reece brought up a moment ago about these stipulations, and particularly with reference to the Dearborn Supply Co. case? There are two characters of stipulation, as the witness has explained. They are these: Those which are submitted to proposed respondents, by means of which if they execute them no complaint issues and the case is disposed of.

There are other stipulations as to the facts, which are drawn up between counsel during the trial of the case, just as you gentlemen stipulate in the trial of cases.

Mr. RABIN. They take out many of the issues?

Mr. WHITELEY. Many or all of the issues. The Dearborn Supply Co. case, I am informed, was stipulated in June 1937, almost a year before the passage of the Wheeler-Lea Act.

I think that there must have been some misunderstanding about the stipulation. If the Congressman is referring to a stipulation which was submitted prior to the issuance of a complaint, I think there must be some mistake about it.

If you are going to put in as typical of stipulations one of these stipulations which were executed subsequent to the Wheeler-Lea Act, of course you should put in one that was executed before, because they were very different.

Now, my information from the Commission is that the preliminary stipulation, which was tendered in the Dearborn Supply Co. case, was in June 1937. I believe, however, that during the trial of the case there was a stipulation executed between counsel, and that may be the stipulation to which the Congressman is referring.

Mr. REECE. No; what I am referring to here is the stipulation in the Miles case, which is with the covering letter which accompanied it, dated November 17, 1942.

Mr. WHITELEY. Well, Mr. Reece, was that the stipulation to which you referred when you questioned the witness about the Dearborn Supply Co. case?

Mr. REECE. No; at that time I was not referring to this stipulation, but I did refer during the course of the discussion to the action which was taken in this case; or that is, as I recall, what I did.

Mr. WHITELEY. Well, my understanding is, and Judge Davis will have the exact records on that when he comes before the Commission, that the stipulation in the Dearborn case was executed in June 1937.

Mr. RABIN. Let me understand this: One type of stipulation is entered into during the course of the proceeding, to expedite the trial, where you stipulate certain facts. The other stipulation is a proposed stipulation which, if executed, would end the case. That is the one which Mr. Reece has in mind.

Mr. REECE. That is right.

If agreeable to the committee, I suggest that this, together with the complaint in the case which ensued, be incorporated in the record.

Mr. SADOWSKI. Is that complaint included here in the group which you handed me?

Mr. CASSEDY. The Miles Laboratories? Yes, sir.

Mr. REECE. The others should be filed with the committee and made reference to.

Mr. SADOWSKI. I believe we can put them all in. They are not so very long. We will put them all in.

(The cases are as follows:)

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

Docket No. 4993

IN THE MATTER OF MILES LABORATORIES, INC., A CORPORATION

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Miles Laboratories, Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the pub-

lic interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH ONE: Respondent, Miles Laboratories, Inc., is a corporation, organized and existing under and by virtue of the laws of the State of Indiana, with its principal place of business at Elkhart, in said State.

PARAGRAPH TWO: Respondent is now, and for many years last past has been, engaged in the sale and distribution of various medicinal preparations, one known and designated as "Dr. Miles Liquid Nerve," another as "Dr. Miles Nerve Tablets," and the third as "Dr. Miles Anti-Pain Pills." The first two of said preparations are sometimes designated as "Dr. Miles Nerve" without distinction between the liquid and tablet forms. Respondent causes said preparations, when sold, to be shipped from its place of business in the State of Indiana to the purchasers thereof located in various other States of the United States and in the District of Columbia. Respondent maintains, and at all times mentioned herein has maintained, a course of trade in said medicinal preparations in commerce between and among the various States of the United States and in the District of Columbia.

PARAGRAPH THREE: In the course and conduct of its aforesaid business, respondent has disseminated and is now disseminating, and has caused and is now causing the dissemination of, false advertisements of and concerning its said preparations by the United States mails and by various other means in commerce, as commerce is defined in the Federal Trade Commission Act; and respondent has also disseminated, and is now disseminating, and has caused and is now causing the dissemination of, false advertisements concerning its said preparations, by various means for the purpose of inducing, and which are likely to induce, directly or indirectly, the purchase of said preparations in commerce, as commerce is defined in the Federal Trade Commission Act.

Among and typical of statements contained in the false, misleading, and deceptive advertisements disseminated and caused to be disseminated, as hereinabove set forth, by United States mails, by radio continuities, by advertisements inserted in newspapers and periodicals, by booklets and other advertising media, with respect to Dr. Miles Liquid Nerve and Dr. Miles Nerve Tablets, are the following:

"Don't miss out on your share of good times. The next time overtaxed nerves make you Wakeful, Restless, Irritable, try the soothing effect of Dr. Miles Nerve."

"Have you ever had a day when you felt tense, jumpy, irritable? A night when you were wakeful and restless? Overtaxed nerves are likely to cause loss of friends, loss of sleep, loss of pleasure, time missed from work, family quarrels, physical and mental suffering. The next time you feel nervous try the soothing effect of one or two Dr. Miles Effervescent Nerve Tablets. Try Dr. Miles Effervescent Nerve Tablets for Sleeplessness due to nervousness, Nervous Irritability, Nervous Headache, Excitability and Restlessness."

"Overtaxed nerves lie to you. They fill your mind with imaginary disorders and woes. If (or when) you are nervous why not seek relief as thousands of others do, by taking Dr. Miles Effervescent Nerve Tablets. Dr. Miles Effervescent Nerve Tablets help to quiet jangled nerves, to permit refreshing sleep, to lessen nervous excitability and irritability. * * * Just one or two tablets at the first symptom of nervous tension may save you hours of discomfort."

"Next time nerves threaten to give you a hectic day or a wakeful night, take Dr. Miles Liquid Nerve."

"When tense nerves interfered with Jim's career, I resolved to do something about it. So, I went to a drug store and got a package of Dr. Miles Effervescent Nerve Tablets. * * * He's not cranky now, and he's sleeping a lot better. * * * Now both of us use Dr. Miles Nerve Tablets when we need relief from Sleeplessness, Nervous Headache, Restlessness, Nervous Irritability, and Excitability."

"Thousands use Dr. Miles Nerve as a mild but effective sedative when tense nerves threaten their calm and peace of mind."

PARAGRAPH FOUR: Through the use of the above statements and other similar thereto, all of which purport to be descriptive of the therapeutic value and effects of respondent's preparations, and descriptive of the symptoms for which, and the conditions under which, said preparations may be used and are recommended by respondent, respondent represents that restlessness, sleeplessness, irritability, jumpiness, imaginary disorders and woes, excitability and headaches are symp-

toms of nervousness and that the use of respondent's preparations "Dr. Miles Liquid Nervine" and "Dr. Miles Nervine Tablets" constitute an adequate, proper, and effective treatment for the relief of such symptoms.

PARAGRAPH FIVE: The aforesaid statements and representations contained in said advertisements, used and disseminated by respondent, are misleading and deceptive. In truth and in fact, nervousness is itself only a symptom of manifestation of some underlying condition and while the various symptoms enumerated in Paragraph Four hereof may be the result of nervousness, and may be relieved, in whole or in part, by the use of respondent's said preparations, such relief will be only temporary and the said symptoms will recur until the underlying conditions causing the nervousness and the various symptoms are removed or relieved. These underlying conditions cannot be removed or relieved by the use of respondent's said preparations.

PARAGRAPH SIX: Respondent's advertisements of and concerning its Liquid Nervine and Nervine Tablets constitute false advertisements within the meaning of the Federal Trade Commission Act for the further reason that they fail to reveal facts material in the light of the representations therein contained and material with respect to the consequences which may result from the use of said preparations under the conditions prescribed in said advertisements and under such conditions as are customary and usual.

The active ingredients of respondent's Liquid Nervine and Nervine Tablets and the amount of each contained in a dose (one teaspoonful or one tablet) are as follows:

Sodium Bromide.....	4.5 grains
Potassium Bromide.....	4.5 grains
Ammonium Bromide.....	0.5 grain

The dosage and frequency of administration recommended on the label of the container are one teaspoonful, or one tablet, which may be repeated in one hour if necessary, not exceeding three teaspoonfuls, or three tablets, in 24 hours. The continued use of either of said preparations in a quantity exceeding the recommended dose, or with a frequency exceeding that recommended, may cause skin eruptions and mental derangement. Their administration to children may be injurious to health.

The underlying conditions causing nervousness are not relieved by the use of respondent's said preparations and any symptomatic or partial relief afforded through their use is of a temporary nature. As a consequence, the said symptoms may, and are likely to, recur day after day for an extended period of time.

Because of these facts, the usual and customary condition, in cases of nervousness, and in the presence of the various symptoms thereof, is that there will exist a tendency for the sufferer to take larger and more frequent doses of respondent's preparations than those prescribed and the tendency will exist to continue such use day after day over an extended period.

Respondent's said advertisements do not contain any warning against use of said preparations in greater amount or with greater frequency than that recommended. Further, the representations in said advertisements that said preparations are preventives of the symptoms for which they are recommended have and will have a tendency to cause persons who have been and are subject thereto to take more frequent doses and larger doses than recommended.

PARAGRAPH SEVEN: Respondent's advertisements of and concerning its preparation Anti-Pain Pills constitute false advertisements within the meaning of the Federal Trade Commission Act for the reason that they fail to reveal facts material in the light of the representations therein contained and material with respect to the consequences which may result from the use of said preparation under the conditions prescribed in said advertisements, and under such conditions are customary and usual.

The active ingredients of said preparation and the amount of each contained in a dose are as follows:

Acetanilid.....	2 grains
Caffeine.....	.25 grains

The dosage and frequency of administration recommended on the label of the container are one tablet; if not relieved repeat after interval of three hours, not exceeding two tablets in any 24 hours. The continued use of said preparation in a quantity exceeding the recommended dose, or with a frequency exceeding that recommended, may cause dependence upon the said active ingredients, or upon the preparation in which they are contained, and may cause blood dis-

turbances and collapse. Its administration to children may be injurious to health.

Respondent represents in its advertisements that its Anti-Pain Pills will relieve headache and other pains. In many cases the headache or other pain will persist for an extended period of time and tend to recur after the palliative effect of the analgesic may have worn off. The palliative effect of said preparation does not extend over a period exceeding four hours for each prescribed dose. Because of these facts, the usual and customary condition in cases of persistent headaches or other pain is and will be that there will exist a tendency for the sufferer to take more frequent and larger doses than prescribed. Such increased use will in itself tend to cause headache, creating a tendency to take additional and more frequent doses. Respondent's advertisements of and concerning said preparation do not contain any warning against frequency than that recommended.

PARAGRAPH EIGHT: The use by the respondent of the foregoing false, deceptive, and misleading advertisements and representations has had, and now has, the capacity and tendency to and does mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said advertisements and representations are true, and that said preparations are safe and harmless for administration to children, and safe and harmless for use under the conditions prescribed in respondent's said advertisements and under such conditions as are customary and usual, and to induce a substantial portion of the public, because of such erroneous and mistaken belief, to purchase said medicinal preparations.

PARAGRAPH NINE: The acts and practices of the respondent, as herein alleged, are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission, on this 6th day of July, A. D. 1943, issues this, its complaint against the respondent.

NOTICE

Notice is hereby given you, Miles Laboratories, Inc., a corporation, respondent herein, that the 13th day of August, A. D. 1943, at 2 o'clock in the afternoon, is hereby fixed as the time, and the offices of the Federal Trade Commission in the city of Washington, D. C., as the place, when and where a hearing will be had on the charges set forth in this complaint, at which time and place you will have the right, under said Act, to appear and show cause why an order should not be entered by said Commission requiring you to cease and desist from the violations of the law charged in the complaint.

You are notified and required, on or before the twentieth day after service upon you of this complaint, to file with the Commission an answer to the complaint. If answer is filed and if your appearance at the place and on the date above stated be not required, due notice to that effect will be given you. The Rules of Practice adopted by the Commission with respect to answers or failure to appear or answer (Rule IX) provide as follows:

In case of desire to contest the proceeding the respondent shall, within twenty (20) days from the service of the complaint, file with the Commission an answer to the complaint. Such answer shall contain a concise statement of the facts which constitute the ground of defense. Respondent shall specifically admit or deny or explain each of the facts alleged in the complaint, unless respondent is without knowledge, in which case respondent shall so state.

* * * * *

Failure of the respondent to file answer within the time above provided and failure to appear at the time and place fixed for hearing shall be deemed to authorize the Commission, without further notice to respondent, to proceed in regular course on the charges set forth in the complaint.

If respondent desires to waive hearing on the allegations of fact set forth in the complaint and not to contest the facts, the answer may consist of a statement that respondent admits all the material allegations of fact charged in the complaint to be true. Respondent by such answer shall be deemed to have waived a hearing on the allegations of fact set forth in said complaint and to have authorized the Commission, without further evidence, or other intervening procedure, to find such facts to be true.

Contemporaneously with the filing of such answer the respondent may give notice in writing that he desires to be heard on the question as to whether the admitted facts constitute the violation of law charged in the complaint. Pursuant to such notice, the respondent may file a brief, directed solely to that question, in accordance with Rule XXIII.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this, its complaint, to be signed by its Secretary, and its official seal to be hereto affixed, at Washington, D. C., this 6th day of July, A. D. 1943.

By the Commission.

[SEAL]

OTIS B. JOHNSON,
Secretary.

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

Docket No. 4852

IN THE MATTER OF CAPUDINE CHEMICAL COMPANY, A CORPORATION

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the Capudine Chemical Company, a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH ONE: Respondent, Capuline Chemical Company, is a corporation organized and existing under and by virtue of the laws of the State of North Carolina, with its principal place of business at Raleigh, in said State.

PARAGRAPH TWO: Respondent now and for some time last past has been engaged in the manufacture, sale and distribution of a medicinal preparation known and designated as "Hick's Liquid Capudine." Respondent causes said preparation, when sold, to be shipped from its place of business to the purchasers thereof located in various States other than the State of North Carolina and in the District of Columbia.

Respondent maintains, and at all times mentioned herein has maintained, a course of trade in its said medicinal preparation, in commerce between and among the various States of the United States and in the District of Columbia.

PARAGRAPH THREE: In the course and conduct of its aforesaid business, respondent has disseminated and is now disseminating and has caused and is now causing the dissemination of false advertisements concerning its said product by use of the United States mails and by various means in commerce, as commerce is defined in the Federal Trade Commission Act, and respondent has disseminated and is now disseminating and has caused and is now causing the dissemination of false advertisements concerning its said product by various means for the purpose of inducing, and which are likely to induce, directly or indirectly, the purchase of said product in commerce, as commerce is defined in the Federal Trade Commission Act.

Among and typical of the false, misleading, and deceptive statements and representations contained in said false advertisements disseminated and caused to be disseminated as hereinafter set forth, by the United States mails, by advertisements inserted in newspapers and periodicals, by radio continuities and by pamphlets, circulars, and other advertising literature, are the following:

"Soothes the nerves. Relieves that tense jittery feeling. Brings relaxation. Imparts a feeling of comfort and well-being. Capudine acts fast because it's liquid. There is nothing to dissolve, so no delay. Reliable because it has been used over forty years."

"Capudine soothes tense nerves, relieves pain, and brings restful relaxation."

"'Morning after' headache—no need to go through the day with a 'hangover headache' * * *. Just take liquid Capudine and note how quickly head clears, pep returns, and nerves are calmed and steadied."

"If travel causes headache, don't let it ruin your trip. Capudine usually gives quick relief. Better still, you may avoid misery by taking Capudine before boarding that train, bus, boat, or plane."

PARAGRAPH FOUR: Through the use of the statements hereinabove set forth, and others similar thereto not specifically set forth herein, all of which purport to be descriptive of the therapeutic value and properties of respondent's said preparation, respondent represents that the use of its preparation "Capudine" relieves tense, jittery nerves, and brings restful relaxation and a feeling of comfort and well-being; that because it is in liquid form it acts more quickly than similar remedies in other forms; that it will relieve the after effects of over-indulgence in food and alcoholic liquors by clearing the head, calming and steadying the nerves, and restoring energy; that if taken before travel begins it will ward off so-called travel headache and will relieve headache caused by travel.

PARAGRAPH FIVE: The aforesaid representations and advertisements used and disseminated by respondent are grossly exaggerated, false, and misleading. In truth and in fact, the use of respondent's said preparation will not effectively relieve tense, jittery nerves, nor will it bring restful relaxation. *It will not give materially quicker relief, because of its liquid form, than similar remedies in other forms.* It will not relieve the after effects of over-indulgence in food or alcoholic liquors in excess of providing temporary relief from the usual accompanying headache. The administration of said preparation before travel cannot be depended upon to ward off so-called travel headache nor relieve headache caused by travel.

PARAGRAPH SIX: *Respondent's advertisements, disseminated as aforesaid, constitute false advertisements for the further reason that they fail to reveal facts material in the light of such representations and material with respect to consequences which may result from the use of the preparation to which the advertisements relate, under the conditions prescribed in said advertisements and under such conditions as are customary and usual.* The ingredients of respondent's preparation and the amount of the principal ingredients contained in a recommended dose of said preparation are as follows:

Antipyrene	-----	3 grains
Potassium bromide	-----	7½ "
Sodium salicylate, caffeine, sodium, bicarb., ammonia, ammonium carbonate.		

The dosage of said preparation and the frequency of its administration, as recommended on the label of the container, are two teaspoonfuls, may be repeated in three or four hours, not more than two doses to be taken in twenty-four hours. *Its continued use in a quantity exceeding the recommended dose, or with a greater frequency than that recommended, may cause skin eruption, mental derangement and serious blood disturbances, and its administration to children may be dangerous and injurious to health.* Respondent's advertisements contain no warnings or statements revealing the potential danger of the excessive use of its said preparation with respect to either the dosage or frequency of use and such failure has the tendency and capacity to lead and leads the public to believe that said preparation may be safely taken in such amounts and with such frequency as may seem necessary to accomplish the represented and desired results.

PARAGRAPH SEVEN: The use by respondent of the foregoing false, deceptive and misleading statements and representations has had, and now has, the capacity and tendency to and does mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations are true, and that said preparation is entirely safe and harmless for use under the conditions prescribed in respondent's advertisements, and under such conditions as are customary and usual, and to induce a substantial portion of the public, because of such erroneous and mistaken belief, to purchase respondent's said medicinal preparation.

PARAGRAPH EIGHT: The acts and practices of the respondent, as herein alleged, are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission in this 16th day of October A. D. 1942, issues its complaint against said respondent.

NOTICE

Notice is hereby given you, Capudine Chemical Company, a corporation, respondent herein, that the 20th day of November A. D. 1942, at 2 o'clock in the afternoon, is hereby fixed as the time, and the offices of the Federal Trade Commission in the city of Washington, D. C., as the place, when and where a hearing will be had on the charges set forth in this complaint, at which time and place you will have the right, under said Act, to appear and show cause why an order should not be entered by said Commission requiring you to cease and desist from the violations of the law charged in the complaint.

You are notified and required, on or before the twentieth day after service upon you of this complaint, to file with the Commission an answer to the complaint. If answer is filed and if your appearance at the place and on the date above stated be not required, due notice to that effect will be given you. The Rules of Practice adopted by the Commission with respect to answers or failure to appear or answer (Rule IX) provide as follows:

In case of desire to contest the proceeding the respondent shall, within twenty (20) days from the service of the complaint, file with the Commission an answer to the complaint. Such answer shall contain a concise statement of the facts which constitute the ground of defense. Respondent shall specifically admit or deny or explain each of the facts alleged in the complaint, unless respondent is without knowledge, in which case respondent shall so state.

* * * * *

Failure of the respondent to file answer within the time above provided and failure to appear at the time and place fixed for hearing shall be deemed to authorize the Commission, without further notice to respondent, to proceed in regular course on the charges set forth in the complaint.

If respondent desires to waive hearing on the allegations of fact set forth in the complaint and not to contest the facts, the answer may consist of a statement that respondent admits all the material allegations of fact charged in the complaint to be true. Respondent by such answer shall be deemed to have waived a hearing on the allegations of fact set forth in said complaint and to have authorized the Commission, without further evidence, or other intervening procedure, to find such facts to be true.

Contemporaneously with the filing of such answer the respondent may give notice in writing that he desires to be heard on the question as to whether the admitted facts constitute the violation of law charged in the complaint. Pursuant to such notice, the respondent may file a brief, directed solely to that question, in accordance with Rule XXIII.

IN WITNESS WHEREOF the Federal Trade Commission has caused this, its complaint, to be signed by its Secretary, and its official seal to be hereto affixed, at Washington, D. C., this 16th day of October A. D. 1942.

By the Commission.

[SEAL]

OTIS B. JOHNSON,
Secretary.

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

Docket No. 4852

IN THE MATTER OF CAPUDINE CHEMICAL COMPANY, A CORPORATION

AMENDED COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the Capudine Chemical Company, a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its amended complaint, stating its charges in that respect as follows:

PARAGRAPH ONE: Respondent, Capudine Chemical Company, is a corporation organized and existing under and by virtue of the laws of the State of North Carolina, with its principal place of business at Raleigh, in said State.

PARAGRAPH TWO: Respondent now and for some time last past has been engaged in the manufacture, sale, and distribution of a medicinal preparation known and designated as "Hick's Liquid Capudine." Respondent causes said preparation, when sold, to be shipped from its said place of business to the purchasers thereof located in various other than the State of North Carolina and in the District of Columbia.

Respondent maintains, and at all times mentioned herein has maintained, a course of trade in its said medicinal preparation, in commerce between and among the various States of the United States and in the District of Columbia.

PARAGRAPH THREE: In the course and conduct of its aforesaid business, respondent has disseminated and is now disseminating and has caused and is now causing the dissemination of false advertisements concerning its said product by the use of the United States mails and by various means in commerce, as commerce is defined in the Federal Trade Commission Act, and respondent has disseminated and is now disseminating and has caused and is now causing the dissemination of false advertisements concerning its said product by various means for the purpose of inducing, and which are likely to induce directly or indirectly, the purchase of said product in commerce, as commerce is defined in the Federal Trade Commission Act.

Among and typical of the false, misleading, and deceptive statements and representations contained in said false advertisements disseminated and caused to be disseminated as hereinafter set forth, by the United States mails, by advertisements inserted in newspapers and periodicals, by radio continuities and by pamphlets, circulars, and other advertising literature, are the following:

"Soothes the nerves. Relieves that tense jittery feeling. Brings relaxation. Imparts a feeling of comfort and well-being. Capudine acts fast because it's liquid. There is nothing to dissolve, so no delay. Reliable because it has been used over forty years."

"Capudine soothes tense nerves, relieves pain and brings restful relaxation."

"'Morning after' headache—no need to go through the day with a 'hang-over headache' * * *. Just take liquid Capudine and note how quickly head clears, pep returns and nerves are calmed and steadied."

"If travel causes headache, don't let it ruin your trip. Capudine usually gives quick relief. Better still, you may avoid misery by taking Capudine before boarding that train, bus, boat, or plane."

PARAGRAPH FOUR: Through the use of the statements hereinabove set forth, and others similar thereto not specifically set forth herein, all of which purport to be descriptive of the therapeutic value and properties of respondent's said preparation, respondent represents that the use of its preparation "Capudine" relieves tense, jittery nerves and brings restful relaxation and a feeling of comfort and well-being; that because it is in liquid form it acts more quickly than similar remedies in other forms; that it will relieve the after effects of over-indulgence in food and alcoholic liquors by clearing the head, calming and steadying the nerves and restoring energy; that if taken before travel begins it will ward off so-called travel headache and will relieve headache caused by travel.

PARAGRAPH FIVE: The aforesaid representations and advertisements used and disseminated by respondent are grossly exaggerated, false and misleading. In truth and in fact, the use of respondent's said preparation will not effectively relieve tense, jittery nerves nor will it bring restful relaxation. It will not give materially quicker relief, because of its liquid form, than similar remedies in other forms. It will not relieve the after effects of over-indulgence in food or alcoholic liquors in excess of providing temporary relief from the usual accompanying headache. The administration of said preparation before travel cannot be depended upon to ward off so-called travel headache nor relieve headache caused by travel.

PARAGRAPH SIX: Respondent's advertisements, disseminated as aforesaid, constitute false advertisements for the further reason that they fail to reveal facts material in the light of such representations and material with respect to consequences which may result from the use of the preparation to which the advertisements relate, under the conditions prescribed in said advertisements, and under such conditions as are customary and usual.

The ingredients of respondent's preparation and the amount of the principal ingredients contained in a recommended dose of said preparation are as follows:

Antipyrène-----	3 grains
Potassium bromide-----	7½ grains
Sodium salicylate, caffeine, sodium, bicarb., ammonia, ammonium carbonate.	

The dosage of said preparation and the frequency of its administration, as recommended on the label of the container, are two teaspoonfuls, which may be repeated in three or four hours, not more than two doses to be taken in twenty-four hours. Its continued use in a quantity exceeding the recommended dose, or with a greater frequency than that recommended, may cause skin eruption, mental derangement, and serious blood disturbances, and its administration to children may be dangerous and injurious to health.

The respondent represents that its product will relieve headache and other pains. In many cases the headache or other pain will persist for an extended period of time and tend to recur after the palliative effect of an analgesic may have worn off. The palliative effect of respondent's product does not extend over a period exceeding four hours for each prescribed dose. Because of these facts, the usual and customary condition in cases of persistent headache or other pain is and will be that there will exist a tendency for the sufferer to take more frequent and larger doses than prescribed. Such increased use will in itself tend to cause headache, creating a tendency to take additional and more frequent doses. Respondent's advertisements contain no caution or warning against use of its product in greater amount or with greater frequency than as stated on the label.

PARAGRAPH SEVEN: The use by respondent of the foregoing false, deceptive, and misleading advertisements, statements, and representations has had, and now has, the capacity and tendency to and does mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said advertisements, statements, and representations are true and that said preparation is safe and harmless for use under the conditions prescribed in respondent's advertisements, and under such conditions as are customary and usual, and to induce a substantial portion of the public, because of such erroneous and mistaken belief, to purchase respondent's said medicinal preparation.

PARAGRAPH EIGHT: The acts and practices of the respondent, as herein alleged, are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this 30th day of January A. D. 1943, issues its amended complaint against said respondent.

NOTICE

Notice is hereby given you, Capudine Chemical Company, a corporation, respondent herein, that the 5th day of March A. D. 1943, at 2 o'clock in the afternoon, is hereby fixed as the time, and the offices of the Federal Trade Commission in the city of Washington,, D. C., as the place, when and where a hearing will be had on the charges set forth in this amended complaint, at which time and place you will have the right, under said Act to appear and show cause why an order should not be entered by said Commission requiring you to cease and desist from the violations of the law charged in the amended complaint.

You are notified and required, on or before the twentieth day after service upon you of this amended complaint, to file with the Commission an answer to the amended complaint. If answer is filed and if your appearance at the place and on the date above stated be not required, due notice to that effect will be given you. The Rules of Practice adopted by the Commission with respect to answers or failure to appear or answer (Rule IX) provide as follows:

In case of desire to contest the proceeding the respondent shall, within twenty (20) days from the service of the complaint, file with the Commission an answer to the complaint. Such answer shall contain a concise statement of the facts which constitute the ground of defense. Respondent shall specifically admit or deny or explain each of the facts alleged in the complaint, unless respondent is without knowledge, in which case respondent shall so state.

* * * * *

Failure of the respondent to file answer within the time above provided and failure to appear at the time and place fixed for hearing shall be deemed to authorize the Commission, without further notice to respondent, to proceed in regular course on the charges set forth in the complaint.

If respondent desires to waive hearing on the allegations of fact set forth in the complaint and not to contest the facts, the answer may consist of a statement that respondent admits all the material allegations of fact charged in the complaint to be true. Respondent by such answer shall be deemed to have waived a hearing on the allegations of fact set forth in said complaint and to have authorized the Commission, without further evidence, or other intervening procedure, to find such facts to be true.

Contemporaneously with the filing of such answer the respondent may give notice in writing that he desires to be heard on the question as to whether the admitted facts constitute the violation of law charged in the complaint. Pursuant to such notice, the respondent may file a brief, directed solely to that question, in accordance with Rule XXIII.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this, its amended complaint, to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D. C., this 30th day of January A. D. 1943.

By the Commission.

[SEAL]

OTIS B. JOHNSON,
Secretary.

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

Docket No. 4854

IN THE MATTER OF EMERSON DRUG COMPANY, A CORPORATION

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Emerson Drug Company, a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH ONE: Respondent, Emerson Drug Company, is a corporation organized and existing under and by virtue of the laws of the State of Maryland, with its principal office and place of business located at Bromo-Seltzer Tower Building, Baltimore, Maryland.

PARAGRAPH TWO: Respondent is now and for some time last past, has been, engaged in the manufacture, sale and distribution of a medicinal preparation known and designated as "Bromo-Seltzer." Respondent causes said preparation, when sold, to be shipped from its said place of business in the State of Maryland and from warehouses in various States, to the purchasers thereof located in various States other than the States of origin of such shipments and in the District of Columbia.

Respondent maintains, and all times mentioned herein has maintained, a course of trade in its said medicinal preparation, in commerce between and among the various States of the United States and in the District of Columbia.

PARAGRAPH THREE: In the course and conduct of its aforesaid business the respondent has disseminated and is now disseminating and has caused and is now causing the dissemination of false advertisements concerning its said product by use of the United States mails and by various other means in commerce, as commerce is defined in the Federal Trade Commission Act and respondent has disseminated and is now disseminating and has caused and is now causing the dissemination of false advertisements concerning its said product by various means for the purpose of inducing, and which are likely to induce, directly or indirectly, the purchase of said product in commerce, as commerce is defined in the Federal Trade Commission Act.

Among and typical of the false, misleading, and deceptive statements and representations contained in said false advertisements disseminated and caused

to be disseminated as hereinabove set forth by the United States mails, by advertisements inserted in newspapers and periodicals and by pamphlets, circulars, and other advertising literature, are the following:

"Fight headaches 3 ways: a headache disturbs your nervous system; with jumpy nerves often goes an upset stomach; in turn affecting the pain in your head—thus making a vicious circle."

"Bromo-Seltzer helps stop pain, calm nerves, settle the stomach."

"Don't just 'deaden' a headache—Bromo-Seltzer gives 3-way relief—it helps settle the stomach, calm the nerves in addition to relieving the pain."

"Why not avoid morning-after misery? Try this simple before and after way—before bedtime, take Bromo-Seltzer to counteract the effects of over-indulgence. While you are sleeping, it settles your upset stomach, soothes jittery nerves and ALKALIZES! After waking, another Bromo-Seltzer relieves the effects of fatigue caused by late bedtime. You feel refreshed, more alert."

"* * * it not only quickly relieves that *pain* of headaches but gives you 3 important EXTRA benefits. 1: Settles sickish upset stomach. 2: Calms jittery nerves. 3: Helps you feel more alert."

"It alkalizes—reduces the excess acidity caused by over-indulgence."

PARAGRAPH FOUR: Through the use of the statements hereinabove set forth, and others similar thereto not specifically set forth herein, all of which purport to be descriptive of the therapeutic value and properties of the respondent's said preparation, respondent represents that over-indulgence in food or drink causes excess acidity in the system and that the use of its said preparation counteracts the effects of over-indulgence in food or drink, reduces excess acidity and alkalizes the system; that it will calm and soothe the nerves; that it settles a sickish or upset stomach, relieves the effects of fatigue caused by loss of sleep and rest and will make one feel refreshed and more alert.

PARAGRAPH FIVE: The aforesaid representations and advertisements used and disseminated by respondent are grossly exaggerated, false and misleading.

In truth and in fact, over-indulgence in food or drink will not cause excess acidity in the system and the use of respondents preparation will not counteract the effects of over-indulgence in food or drink and will not reduce excess acidity or alkalize the system. It will not calm and soothe the nerves. It will not settle a sickish or upset stomach, relieve the effects of fatigue caused by loss of sleep and rest and will not make one feel refreshed and more alert.

PARAGRAPH SIX: Respondent's advertisements, disseminated as aforesaid, constitute false advertisements for the further reason that they fail to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the preparation to which the advertisements relate, under the conditions prescribed in said advertisements, or under such conditions as are customary and usual. The ingredients of Bromo-Seltzer and the amount of each contained in a heaping teaspoonful, are as follows:

Acetanilid	21½ gr.
Sodium Bromide.....	5 gr.
Caffeine (alkaloid).....	0.9 gr.
An effervescent base.	

The dosage of Bromo-Seltzer and the frequency of its administration, as recommended on the label of the container, are one heaping teaspoonful, which may be repeated after three hours, not exceeding two doses in 24 hours. Its continued use in a quantity exceeding the recommended dose, or with a greater frequency than the recommended frequency may cause dependence upon the drug, skin eruptions, mental derangement, and collapse, and its administration to children may be dangerous and injurious to health. Respondents advertisements contain no warnings or statements revealing the potential danger of the excessive use of its said preparation with respect to either the dosage or frequency of use and such failure has the tendency and capacity to lead and leads the public to believe that said preparation may be safely taken in such amounts and with such frequency as may be necessary to accomplish the represented and desired results.

PARAGRAPH SEVEN: The use by the respondent of the foregoing false, deceptive, and misleading statements and representations has had, and now has, the capacity and tendency to and does mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations are true, and that said preparation is entirely safe and harmless for use, under the conditions prescribed in respondents advertisements, or under such conditions as are customary and usual, and to induce a substantial portion of the public, because of such erroneous and mistaken belief, to purchase respondent's said medicinal preparation.

PARAGRAPH EIGHT: The acts and practices of the respondent, as herein alleged, are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this 16th day of October A. D. 1942, issues its complaint against said respondent.

NOTICE

Notice is hereby given you, Emerson Drug Company, a corporation, respondent herein, that the 20th day of November A. D. 1942, at 2 o'clock in the afternoon is hereby fixed as the time, and the offices of the Federal Trade Commission in the city of Washington, D. C., as the place, when and where a hearing will be had on the charges set forth in this complaint, at which time and place you will have the right, under said Act, to appear and show cause why an order should not be entered by said Commission requiring you to cease and desist from the violations of the law charged in the complaint.

You are notified and required, on or before the twentieth day after service upon you of this complaint, to file with the Commission an answer to the complaint. If answer is filed and if your appearance at the place and on the date above stated be not required, due notice to that effect will be given you. The Rules of Practice adopted by the Commission with respect to answers or failure to appear or answer (Rule IX) provide as follows:

In case of desire to contest the proceeding the respondent shall, within twenty (20) days from the service of the complaint, file with the Commission an answer to the complaint. Such answer shall contain a concise statement of the facts which constitute the ground of defense. Respondent shall specifically admit or deny or explain each of the facts alleged in the complaint, unless respondent is without knowledge, in which case respondent shall so state.

* * * * *

Failure of the respondent to file answer within the time above provided and failure to appear at the time and place fixed for hearing shall be deemed to authorize the Commission, without further notice to respondent, to proceed in regular course on the charges set forth in the complaint.

If respondent desires to waive hearing on the allegations of fact set forth in the complaint and not to contest the facts, the answer may consist of a statement that respondent admits all the material allegations of fact charged in the complaint to be true. Respondent by such answer shall be deemed to have waived a hearing on the allegations of fact set forth in said complaint and to have authorized the Commission, without further evidence, or other intervening procedure, to find such facts to be true.

Contemporaneously with the filing of such answer the respondent may give notice in writing that he desires to be heard on the question as to whether the admitted facts constitute the violation of law charged in the complaint. Pursuant to such notice, the respondent may file a brief, directed solely to that question, in accordance with Rule XXIII.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this, its complaint, to be signed by its Secretary, and its official seal to be hereto affixed, at Washington, D. C., this 16th day of October A. D. 1942.

By the Commission.

[SEAL]

OTIS B. JOHNSON,
Secretary.

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

Docket No. 4854

IN THE MATTER OF EMERSON DRUG COMPANY, A CORPORATION

AMENDED COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Emerson Drug Company, a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and in appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its amended complaint stating its charges in that respect as follows:

PARAGRAPH ONE: Respondent, Emerson Drug Company, is a corporation organized and existing under and by virtue of the laws of the State of Maryland with its principal office and place of business located at Bromo-Seltzer Tower Building, Baltimore, Maryland.

PARAGRAPH TWO: Respondent is now and for some time last past, has been, engaged in the manufacture, sale and distribution of a medicinal preparation known as designated as "Bromo-Seltzer." Respondent causes said preparation, when sold, to be shipped from its said place of business in the State of Maryland and from warehouses in various States, to the purchasers thereof located in various States other than the States of origin of such shipments and in the District of Columbia.

Respondent maintains, and all times mentioned herein has maintained, a course of trade in its said medicinal preparation, in commerce between and among the various States of the United States and in the District of Columbia.

PARAGRAPH THREE: In the course and conduct of its aforesaid business the respondent has disseminated and is now disseminating and has caused and is now causing the dissemination of false advertisements concerning its said product by use of the United States mails, and by various means in commerce, as commerce is defined in the Federal Trade Commission Act, and respondent has disseminated and is now disseminating and has caused and is now causing the dissemination of false advertisements concerning its said product by various means for the purpose of inducing, and which are likely to induce, directly or indirectly, the purchase of said product in commerce, as commerce is defined in the Federal Trade Commission Act.

Among and typical of the false, misleading, and deceptive statements and representations contained in said false advertisements disseminated and caused to be disseminated as hereinabove set forth by the United States mails, by advertisements inserted in newspapers and periodicals and by pamphlets, circulars, and other advertising literature, are the following:

"Fight headaches 3 ways: a headache disturbs your nervous system; with jumpy nerves often goes an upset stomach; in turn affecting the pain in your head—thus making a vicious circle."

"Bromo-Seltzer helps stop pain, calm nerves, settles the stomach."

"Don't just 'deadend' a headache—Bromo-Seltzer gives 3-way relief—it helps settle the stomach, calm the nerves in addition to relieving the pain."

"Why not avoid morning-after misery? Try this simple before and after way—before bed time, take Bromo-Seltzer to counteract the effects of over-indulgence. While you are sleeping, it settles your upset stomach, soothes jittery nerves and ALKALIZES! After waking, another Bromo-Seltzer relieves the effects of fatigue caused by late bed time. You feel refreshed, more alert."

"* * * it not only quickly relieves that *pain* of headaches but gives you 3 important EXTRA benefits. 1: Settles sickish upset stomach. 2: Calms jittery nerves. 3: Helps you feel more alert."

"It alkalizes—reduces the excess acidity caused by overindulgence."

PARAGRAPH FOUR: Through the use of the statements hereinabove set forth, and others similar thereto not specifically set forth herein, all of which purport to be descriptive of the therapeutic value and properties of the respondent's said preparation, respondent represents that overindulgence in food or drink causes

excess acidity in the system and that the use of its said preparation counteracts the effects of overindulgence in food or drink, reduces excess acidity and alkalizes the system; that it will calm and soothe the nerves; that it settles a sickish or upset stomach, relieves the effects of fatigue caused by loss of sleep and rest and will make one feel refreshed and more alert.

PARAGRAPH FIVE: The aforesaid representations and advertisements used and disseminated by respondent are grossly exaggerated, false and misleading.

In truth and in fact, overindulgence in food or drink will not cause excess acidity in the system and the use of respondent's preparation will not counteract the effects of overindulgence in food or drink and will not reduce excess acidity or alkalize the system. It will not calm and soothe the nerves. It will not settle a sickish or upset stomach, relieve the effects of fatigue caused by loss of sleep and rest and will not make one feel refreshed and more alert.

PARAGRAPH SIX: Respondent's advertisements, disseminated as aforesaid, constitute false advertisements for the further reason that they fail to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of Bromo-Seltzer under the conditions prescribed in said advertisements, and under such conditions as are customary and usual.

The ingredients of Bromo-Seltzer and the amount of each contained in a heaping teaspoonful, are as follows:

Acetanilid.....	2½ grains
Sodium Bromide.....	5 grains
Caffeine (alkaloid).....	0.9 grains
An effervescent base.	

The dosage of Bromo-Seltzer and the frequency of its administration recommended on the label of the container, are one heaping teaspoonful, which may be repeated after three hours, not exceeding two doses in 24 hours. Its continued use in a quantity exceeding the recommended dose, or with a greater frequency than the recommended frequency, may cause dependence upon the drug, skin eruptions, mental derangement and collapse, and its administration to children may be dangerous and injurious to their health.

The respondent represents that its product will relieve headaches and other pains. In many cases the headache or other pain will persist for an extended period of time and tend to recur after the palliative effect of an analgesic may have worn off. The palliative effect of respondent's product does not extend over a period exceeding four hours for each prescribed dose. Because of these facts, the usual and customary condition in cases of persistent headache or other pain is and will be that there will exist a tendency for the sufferer to take more frequent and larger doses than prescribed. Such increased use will in itself tend to cause headache creating a tendency to take additional and more frequent doses. Respondent's advertisements contain no caution or warning against use of its product in greater amount or greater frequency than as stated on the label.

PARAGRAPH SEVEN: The use by the respondent of the foregoing false, deceptive, and misleading advertisements, statements and representations has had, and now has, the capacity and tendency to and does mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said advertisements, statements, and representations are true, and that said preparation is safe and harmless for children, and harmless for use under the conditions prescribed in respondents advertisements, and under such conditions as are customary and usual, and to induce a substantial portion of the public, because of such erroneous and mistaken belief, to purchase respondent's said medicinal preparation.

PARAGRAPH EIGHT: The acts and practices of the respondent, as herein alleged, are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this 30th day of January, A. D. 1943, issues its amended complaint against said respondent.

NOTICE

Notice is hereby given you, Emerson Drug Company, a corporation, respondent herein, that the 5th day of March, A. D. 1943, at 2 o'clock in the afternoon is hereby fixed as the time, and the offices of the Federal Trade Commission in the city of Washington, D. C., as the place, when, and where a hearing will be had

on the charges set forth in this amended complaint, at which time and place you will have the right, under said Act, to appear and show cause why an order should not be entered by said Commission requiring you to cease and desist from the violations of the law charged in the amended complaint.

You are notified and required, on or before the twentieth day after service upon you of this amended complaint, to file with the Commission an answer to the amended complaint. If answer is filed and if your appearance at the place and on the date above stated be not required due notice to that effect will be given you. The Rules of Practice adopted by the Commission with respect to answers or failure to appear or answer (Rule IX) provide as follows:

In case of desire to contest the proceeding the respondent shall, within twenty (20) days from the service of the complaint, file with the Commission an answer to the complaint. Such answer shall contain a concise statement of the facts which constitute the ground of defense. Respondent shall specifically admit or deny or explain each of the facts alleged in the complaint, unless respondent is without knowledge, in which case respondent shall so state.

* * * * *
Failure of the respondent to file answer within the time above provided and failure to appear at the time and place fixed for hearing shall be deemed to authorize the Commission, without further notice to respondent, to proceed in regular course on the charges set forth in the complaint.

If respondent desires to waive hearing on the allegations of fact set forth in the complaint and not to contest the facts, the answer may consist of a statement that respondent admits all the material allegations of fact charged in the complaint to be true. Respondent by such answer shall be deemed to have waived a hearing on the allegations of fact set forth in said complaint and to have authorized the Commission, without further evidence, or other intervening procedure, to find such facts to be true.

Contemporaneously with the filing of such answer the respondent may give notice in writing that he desires to be heard on the question as to whether the admitted facts constitute the violations of law charged in the complaint. Pursuant to such notice, the respondent may file a brief, directed solely to that question, in accordance with Rule XXIII.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this, its amended complaint, to be signed by its Secretary, and its official seal to be hereto affixed, at Washington, D. C., this 30th day of January, A. D. 1943.

By the Commission,
[SEAL]

OTIS B. JOHNSON,
Secretary.

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Docket No. 5038

IN THE MATTER OF THE LARNED CORP., A CORPORATION, AND HILL BLACKETT AND GLEN SAMPLE, INDIVIDUALS AND COPARTNERS TRADING AS BLACKETT-SAMPLE-HUMMERT

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Wyeth Chemical Company, a corporation, and Hill Blackett and Glen Sample, individuals and copartners trading as Blackett-Sample-Hummert, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect, as follows:

PARAGRAPH ONE: Respondent, Wyeth Chemical Company, is a corporation organized and existing under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 257 Cornelison Avenue, city of Jersey City, State of New Jersey.

Respondents, Hill Blackett and Glen Sample, are individuals and copartners trading as Blackett-Sample-Hummert, with their principal office and place of business located at 221 North LaSalle Street, city of Chicago, State of Illinois.

PARAGRAPH TWO: Respondent, Wyeth Chemical Company, is now and has been continuously for several years last past, engaged in the business of offering for sale and selling in commerce, as herein set out, a medicinal preparation, which is designated "Hill's Cold Tablets," and recommended as a remedy for colds and its symptoms.

Respondents Hill Blackett and Glen Sample, individuals and copartners trading as Blackett-Sample-Hummert, a copartnership, are now, and have been continuously for several years last past, engaged in the advertising business. During said time said respondents have been, and are now, employed by the respondent, Wyeth Chemical Company, as its advertising agent in the dissemination of advertisements of Hill's Cold Tablets by means of radio broadcasts and through other media of general circulation and distribution, including the various advertisements hereinafter set forth.

PARAGRAPH THREE: Respondent, Wyeth Chemical Company, being engaged in business as aforesaid, has caused and causes said product known as Hill's Cold Tablets when sold, to be transported from its principal place of business, located in the city of Jersey City, State of New Jersey, to purchasers thereof located at points in various States of the United States other than the State from which said shipments are made, and in the District of Columbia. Said respondent, at all times herein mentioned, has maintained and now maintains a course of trade in commerce in said product so distributed and sold by it between and among the various States of the United States and in the District of Columbia.

PARAGRAPH FOUR: In the course and conduct of the aforesaid business, the respondents have disseminated and are now disseminating, and have caused and are now causing the dissemination of, false advertisements concerning said products by the United States mails and by various other means in commerce, as commerce is defined in the Federal Trade Commission Act; and respondents have also disseminated and are now disseminating, and have caused and are now causing the dissemination of, false advertisements concerning said product, by various means, for the purpose of inducing, and which are likely to induce, directly or indirectly, the purchase of said product in commerce, as commerce is defined in the Federal Trade Commission Act.

Among and typical, but not all-inclusive, of the false, misleading, and deceptive statements and representations contained in said advertisements disseminated and caused to be disseminated, as hereinabove set out by the United States mails, by advertising in newspapers, magazines, and periodicals having a general circulation, by pamphlets, booklets, cards, and other printed or written matter, by radio broadcasts, and by various other means, as aforesaid, are the following:

"When you're catching cold, keep in mind that by doing one simple thing you can quickly relieve your discomfort, largely escape the aches, pains, and soreness that make you feel so miserable.

"Thousands know this way and say there is nothing like it for getting quick relief. What you do is simply this: The moment you feel a cold coming on, get Hill's Cold Tablets from any druggist. Take two at once, with a glass of water. You should feel better almost at once. After that, take just one Hill's Tablet at each mealtime and at bedtime until the symptoms of your cold disappear.

"Hill's Cold Tablets act almost instantly to bring wonderful relief from annoying cold symptoms."

"Here is a way to get quick relief from the symptoms of a cold. A way that eases the aches and pains, acts to reduce fever, relieves your discomfort in a remarkably short time."

"To get prompt and effective relief from the symptoms of a common cold—simply take Hill's Cold Tablets. Be sure to do this at first sign of a cold, for Hill's Cold Tablets contain the very medicinal agents you need for quick relief. Among them are quinine to reduce fever, acetanilid to ease aches and pains, and cascara. Thus completing the treatment of cold symptoms. This remarkable combination of medicinal ingredients gives all-around action, quick results, real relief from your discomfort. So next time you're catching cold take Hill's Cold Tablets at once. You'll feel better in a hurry."

"What you do is simply this: At first sign of a cold, take two Hill's Tablets with a full glass of water. Then, after that, take only one Hill's Tablet at each mealtime and at bedtime. Do this until the symptoms of your cold disappear."

"So try this way next time you're catching cold. Get Hill's Cold Tablets at any druggists * * * take according to directions on the famous red tin box. And relieve the annoying symptoms of your cold almost before they get started."

"I am going to tell you of a way that thousands know from experience works wonders in combatting the annoying symptoms of a cold.

"It's a remarkable preparation called Hill's Cold Tablets and all you do is this: At first sign of cold distress, take two of these Hill's Cold Tablets with a full glass of water. After that, take one Hill's Tablet at each mealtime only and at bedtime. Do this until the symptoms of your cold disappear."

"Right now is the best time to think about relieving the symptoms of your *next* cold. For immediate action is of the utmost importance when you're catching cold. What you should do, is get Hill's Cold Tablets today and keep them handy in your medicine cabinet. For these remarkable tablets contain a number of medicinal agents to treat your cold symptoms. Among them, for example, are quinine—to reduce fever. Acetanilid, to ease aches and pains * * * And cascara. Thus completing the action that gives relief. Take them instantly you feel a cold coming on. You'll find results are fast and unmistakably effective."

"You'll be delighted to find you feel better almost at once. And if you act without losing time when you feel a cold coming on, you can relieve the annoying symptoms almost before they have a chance to get started."

"Here is sensible advice to follow if you're catching cold and want to get quick relief from your discomfort. At first sign of distress, simply take two Hill's Cold Tablets in a glass of water. After that, take just one Hill's Cold Tablet at each mealtime and at bedtime until the symptoms of your cold disappear. In a remarkably short time you will feel a world of improvement. That aching soreness is eased. That 'heavy', tired feeling is relieved."

"You should feel better almost at once. The aching soreness that accompanies your cold is eased. That tired feeling is relieved.

"And the reason for the amazing effectiveness of Hill's is because these tablets contain a number of medicinal agents including acetanilid, to ease aches and pains. Quinine, to help reduce fever. And finally, cascara. This combination of ingredients brings swift, *all around* relief from your discomfort."

"At first sign of a cold, here is what you do to get quick relief from your discomfort. And remember, the sooner you do it the better. Simply take two Hill's Cold Tablets with a glass of water. After that, follow directions on package until the symptoms of your cold disappear.

"You will be astonished to discover how quickly you feel better."

PARAGRAPH FIVE: By and through the use of the statements hereinabove set forth and others similar thereto, not specifically set out herein, all of which purport to be descriptive of the therapeutic and curative properties and powers of Hill's Cold Tablets, respondents have represented, and do now represent, directly and indirectly, that Hill's Cold Tablets will relieve and cure a cold, will relieve and cure all symptoms of a cold and will prevent the development of a cold; that these tablets will act "almost instantly" and "almost at once" in relieving and curing a cold, in relieving and curing all symptoms of a cold and in preventing the development of a cold; that by taking these tablets without losing time, when a cold is coming on the annoying symptoms can be relieved almost before they have a chance to get started; that the symptoms of a cold will disappear within three or four days if, at the first sign of a cold, Hill's Cold Tablets are taken according to the directions on the package; that all colds require the use of a laxative, cause sufficient discomfort to require an analgesic and cause a sufficiently great elevation of temperature to make necessary the administration of an antipyretic; that

these tables will "do an all around job" in the treatment of a cold, will restore vitality and relieve the discomfort of all symptoms of a cold.

PARAGRAPH SIX: The aforesaid statements and representations are grossly exaggerated, false, misleading, and deceptive. In truth and in fact Hill's Cold Tablets will not relieve or cure a cold, will not relieve or cure all symptoms of a cold and will not prevent the development of a cold and any effect produced by the use of said preparation will not be "almost instantly" or "almost at once." All colds do not require the use of a laxative, do not cause sufficient discomfort to require an analgesic and do not cause a sufficiently great elevation of temperature to make necessary the administration of an antipyretic.

The statement: " * * * If you act without losing time when you feel a cold coming on, you can relieve the annoying symptoms almost before they have a chance to get started" is false. Some of the first symptoms of a cold are inflammation of the upper respiratory tract with irritation, sneezing, chilling, congestion, redness, and discharge of mucus. These tablets will not influence these symptoms. The statement "You just take two Hill's Cold Tablets with a glass of water the moment you feel a cold coming on. Then after that you follow the directions on the package until the symptoms of your cold disappear" is false for the reason given above, and for the added reason that the directions for use call for taking the preparation for three or four days whereas the symptoms of an average cold will many times last more than twice this length of time. This preparation will not "do an all-around job" in the treatment of a cold, and will not restore vitality—in fact the acetanilid and quinine content will acts as depressants.

PARAGRAPH SEVEN: Respondents' advertisements, disseminated as aforesaid, constitute false, deceptive, and misleading advertisements for the further reason that they fail to reveal facts material in the light of such representations and material with respect to the consequences which may result from the use of the preparation to which the advertisements relate, under the conditions prescribed in said advertisements and under such conditions as are customary and usual.

Respondents' preparation contains one and one-half grains of acetanilid and one-half grain of cascara in each tablet. The directions for use in radio advertising is two tablets at the inception of a cold and one tablet at each mealtime and at bedtime until symptoms of the cold disappear. The continued use of said preparation in a quantity exceeding recommended dose, or with greater frequency than the recommended frequency, may cause dependence upon the drug acetanilid and collapse and its administration to children may be dangerous and injurious to health.

The respondents represent that said preparation is a competent and effective remedy for colds and all the symptoms thereof. As above stated, there are many symptoms of a cold which will not be relieved by the use of said product. These symptoms are often persistent and sometimes result in complications which continue for a considerable period of time. There are also a number of conditions involving inflammation of the nose and throat which are not colds or the result of colds but which exhibit symptoms which simulate a cold and cannot be readily distinguished from a cold by most individuals. This preparation will not relieve such conditions.

Because of the foregoing facts, the usual and customary condition in the presence of symptoms of a cold or conditions which simulate the symptoms of a cold but which will not be relieved by the use of said preparation, will be that there will exist a tendency for the sufferer to take more frequent and larger doses than recommended in order to obtain the represented and desired relief. Respondents' advertisements contain no caution or warning against use of said preparation in greater amount or with greater frequency than that recommended in its advertising matter or stated on the label.

Furthermore, the drug cascara sagrada is an irritant laxative and is potentially dangerous when taken by one suffering from abdominal pains, stomach ache, cramps, nausea, vomiting or other symptoms of appendicitis.

PARAGRAPH EIGHT: The use by the respondent of the foregoing false, deceptive, and misleading advertisements, statements, and representations has had, and now has, the tendency and capacity to and does mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said advertisements, statements and representations are true and

that said preparation is safe and harmless for children, and harmless for use under the conditions prescribed in said advertisements and under such conditions as are customary and usual, and to induce a substantial portion of the public, because of such erroneous and mistaken belief to purchase respondents' said medicinal preparation.

PARAGRAPH NINE: The aforesaid acts and practices of the respondents, as herein alleged, are all to the prejudice and injury of the public, and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this 31st day of August, A. D., 1943, issues its complaint against respondents.

NOTICE

Notice is hereby given you, Wyeth Chemical Company, a corporation, and Hill Blackett and Glen Sample, individuals and copartners trading as Blackett-Sample-Hummert, respondents herein, that the 8th day of October A. D. 1943, at 2 o'clock in the afternoon, is hereby fixed as the time, and the offices of the Federal Trade Commission in the city of Washington, D. C., as the place, when and where a hearing will be had on the charges set forth in this complaint, at which time and place you will have the right, under said Act, to appear and show cause why an order should not be entered by said Commission requiring you to cease and desist from the violations of the law charged in the complaint.

You are notified and required, on or before the twentieth day after service upon you of this complaint, to file with the Commission an answer to the complaint. If answer is filed and if your appearance at the place and on the date above stated be not required, due notice to that effect will be given you. The Rules of Practice adopted by the Commission with respect to answers or failure to appear or answer (Rule IX) provide as follows:

In case of desire to contest the proceeding the respondent shall, within twenty (20) days from the service of the complaint, file with the Commission an answer to the complaint. Such answer shall contain a concise statement of the facts which constitute the ground of defense. Respondent shall specifically admit or deny or explain each of the facts alleged in the complaint, unless respondent is without knowledge, in which case respondent shall so state.

* * * * *

Failure of the respondent to file answer within the time above provided and failure to appear at the time and place fixed for hearing shall be deemed to authorize the Commission, without further notice to respondent, to proceed in regular course on the charges set forth in the complaint.

If respondent desires to waive hearing on the allegations of fact set forth in the complaint and not to contest the facts, the answer may consist of a statement that respondent admits all the material allegations of fact charged in the complaint to be true. Respondent by such answer shall be deemed to have waived a hearing on the allegations of fact set forth in said complaint and to have authorized the Commission, without further evidence, or other intervening procedure, to find such facts to be true.

Contemporaneously with the filing of such answer the respondent may give notice in writing that he desires to be heard on the question as to whether the admitted facts constitute the violation of law charged in the complaint. Pursuant to such notice, the respondent may file a brief, directed solely to that question, in accordance with Rule XXIII.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this, its complaint, to be signed by its Secretary, and its official seal to be hereto affixed, at Washington, D. C., this 31st day of August A. D. 1943.

By the Commission.

[SEAL]

OTIS B. JOHNSON,
Secretary.

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

At a regular session of the Federal Trade Commission, held at its office in the city of Washington, D. C., on the 12th day of November A. D. 1943

Commissioners: Garland S. Ferguson, Chairman; Charles H. Marsh, Ewin L. Davis, William A. Ayres, Robert E. Freer

Docket No. 5038

IN THE MATTER OF WYETH CHEMICAL COMPANY, ET AL.

ORDER GRANTING MOTION TO SUBSTITUTE RESPONDENT

This matter coming on to be heard by the Commission upon the motion of The Larned Corp., that it be substituted as respondent for said Wyeth Chemical Company herein, and it appearing to the Commission that the name of the respondent herein, Wyeth Chemical Company, a corporation, has been legally changed to The Larned Corp., a corporation, and the Commission having duly considered said motion and the record herein and being now fully advised in the premises;

It is ORDERED that the motion of The Larned Corp., that it be substituted as respondent for said Wyeth Chemical Company herein be, and the same hereby is, granted.

By the Commission.

[SEAL]

OTIS B. JOHNSON,
Secretary.

Mr. REECE. You will then submit, to accompany each complaint the stipulation and agreement which was drawn up?

Mr. CASSEDY. Prior to the complaint you mean?

Mr. REECE. Yes.

Mr. CASSEDY. I presume the usual procedure followed in those cases?

Mr. REECE. In that case, I will just retain that copy of the "cease and desist."

To permit further clarification, so that we will have an understanding on this, it is my understanding that you will file with the copy of the complaints a copy of the stipulation and agreement which was offered to the company?

Mr. CASSEDY. Yes, sir.

Mr. REECE. And that they will come to the committee and appear in the record at the same place?

Mr. CASSEDY. Yes, sir.

Mr. SADOWSKI. All right. You may proceed.

Mr. CASSEDY. Let me point out, Mr. Chairman, that in the case of Miles Laboratories, which I mentioned a few moments ago, Mr. Hoge sought a declaratory judgment. That case was instituted in the District Court of the District of Columbia at the time that the stipulation referred to by Mr. Reece was offered to the respondent, and was prior to the issuance of the complaint in the case.

So the case is actually a decision in that regard as I have read on two occasions already: That the action and procedure of the Commission was not a regulation of labeling. The case was based upon the stipulation that was offered to the respondents. This stipulation follows identically the same procedure as outlined in the policy of the commission that I read.

I would like to file with the committee a copy of the decision in that case.

MR. SADOWSKI. That will be admitted.
(The decision is as follows:)

[140 F. 2d 683, cert. den., 322 U. S. 752 (May 29, 1944)]

Docket 4993

UNITED STATES COURT OF APPEALS

DISTRICT OF COLUMBIA

No. 8595

MILES LABORATORIES, INC., APPELLANT, v. FEDERAL TRADE COMMISSION, ETC., ET AL,
APPELLEES

Appeal from the District Court of the United States for the District of Columbia

Argued January 10, 1944—Decided February 7, 1944

Mr. James F. Hoge, with whom *Messrs. Preston B. Karanagh* and *Preston C. King, Jr.*, were on the brief, for appellant.

Mr. Cyrus B. Austin, member of the Bar of the Court of Appeals of the State of New York, *pro hac vice*, by special leave of Court, with whom *Messrs. William T. Kelley*, Chief Counsel, Federal Trade Commission, and *Edward M. Curran*, United States Attorney, were on the brief, for appellees.

Before GRONER, C. J., and EDGERTON and ARNOLD, JJ.

GRONER, C. J.: Appellant is an Indiana corporation and is engaged in the sale and distribution in interstate commerce of certain medical preparations described as "Dr. Miles' Nervine," "Dr. Miles' Nervine Tablets," and "Dr. Miles' Anti-Pain Pills." The sales of these products amount to around a million dollars annually.

Stated in general terms, the present controversy grows out of the fact that some two or three years ago the Federal Trade Commission, after an investigation, reached the tentative conclusion that appellant's advertising material failed fully to reveal that these preparations, if used by individuals in excess of the dosage recommended, might result in harm to the users. In consequence the Commission addressed a communication to appellant, notifying it of this finding, and suggesting the disposition of the matter by stipulation. This contemplated an agreement on the part of appellant to revise its advertising matter to include a warning to the public in line with the conclusions of the Commission; or, stated in the language of the Commission, so as to reveal to purchasers that its preparations, if used in excess of the dosage recommended on its labels, would be dangerous to health and cause mental derangement, skin eruptions or collapse or dependence upon the drug. The Commission offered as an alternative that if the directions for the use of the preparations appearing on the labels were changed to contain warnings, in similar language to that just used, of dangers of excessive use, the advertisements need contain only the cautionary statement, "Caution, Use Only As Directed."

Appellant declined the Commission's offer to stipulate and brought this suit in the District Court under the Federal Declaratory Judgment Act, seeking a declaration as to the limits of the Commission's authority to dictate and control the contents of appellant's labeling and advertising. The suit was dismissed, on the Commission's motion, upon the ground that the court was without jurisdiction of the subject matter.¹ An appeal to this court followed.

The Federal Trade Commission Act defines unlawful advertising as that which is misleading in a material respect, or which induces the purchase of drugs injurious to health under the conditions prescribed in the advertisement or

¹ *Miles Laboratories v. Federal Trade Com.*, 50 F. Supp. 434.

under such conditions as are customary or usual, and which fails to reveal material facts with respect to the consequences which may result from the use under the conditions advertised.² Appellant says that nothing appears in any of its advertising or labeling contrary to these provisions; that all of its labels, as well as its advertisements, contain accurate statements of the active ingredients in its medicines, the purposes for which they are to be used, as well as the safe and proper doses to be taken; and all of this is admitted on the motion to dismiss. Appellant, therefore, insists that the action of the Commission in demanding that it include in its advertisements, or at its option on its labels, a statement to the effect that the excessive use of any of the medicines may result in mental derangement or cause collapse or dependence upon the drug, is wholly beyond the power of the Commission. But appellant admits, as of course it must, that the Act does give the Commission power, after notice and hearing, to prohibit false advertising of drugs, as that term is defined in the Act; and that is the provision on which the Commission based its right to request a stipulation that appellant conform its advertising to the Commission's construction of the statute as an alternative to a proceeding by the Commission to seek to accomplish the same end through the issuance of a "complaint." We see no objection to this procedure. Certainly, there can be no contention that the Commission is without statutory authority to issue a complaint when it "has reason to believe" that someone is using misleading matter in the advertising and sale of its medicinal products—for the Act specifically so provides.³ Whether, having issued a complaint and held a hearing, its decision on the facts or on the law is correct is a question which cannot be challenged in a District Court, either before or after the event, for in such case an appeal to an appropriate court of appeals is made the exclusive remedy.⁴ Here, as we have seen, appellant's contention is that its advertisements are lawful and hence do not offend the Act, and that its labels are matters not within the scope of the Act, as the result of which the Commission has no lawful right to issue its complaint in the one case or the other, and that accordingly it ought to be saved the expense and embarrassment of a long and useless Commission proceeding. The Commission denies, and we think correctly, that it is attempting to regulate appellant's labels. All that it said on that subject was to offer that means of correction as a choice which appellant could take or leave as it pleased. However desirable it may be thought that appellant, when challenged as to its methods of business, should have recourse to a court of equity to construe the extent of the Commission's power in a case in which it is made to appear that a public hearing will result in irreparable injury, nevertheless, it has been held so often as not to require citation of authority, that for a Federal Court to assume the right to suspend the Commission's investigation, while it determines controversial questions of law or fact, would be a clear assumption of power it does not possess. The administrative remedy which Congress has provided must be first exhausted. To hold otherwise, the Supreme Court has recently and explicitly said,⁵

" * * * would * * * in effect substitute the District Court for the Board as the tribunal to hear and determine what Congress declared the Board exclusively should hear and determine in the first instance."

That the Supreme Court will change or modify its views in this respect is an "iridescent dream," for the trend is decidedly the other way. On no subject is the opinion of that Court, as I view it, more definitely fixed than it is on the lack of power of the courts to inject themselves or be injected into proceedings which Congress has committed to the primary jurisdiction of administrative agencies. Indeed, it has been held in some cases that even a right of review, if not provided in the statute, may not be supplied by the courts;⁶ and this doctrine

² 15 U. S. C. A., §§ 52 (a), 54 (a), 55 (a). § 55 (a) provides: "The term 'false advertisement' means an advertisement, other than labeling, which is misleading in a material respect; and in determining whether any advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound, or any combinations thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual."

³ 15 U. S. C. A. §§ 45 (b), 52 (b).

⁴ 15 U. S. C. A. § 45 (d).

⁵ *Myers v. Bethlehem Corp.*, 303 U. S. 41, 50.

⁶ *Louisiana v. McAdoo*, 234 U. S. 627, 633.

was recently extended to a case in which the claim was that the action of the Board was arbitrary and unreasonable. See *Per Curiam*, December 6, 1943, in *re Brotherhood of Ry. & S. Clerks v. United T. S. E. of America*.⁷

In the present case and on the present record—if the question were open—it might very well be argued that appellant's advertising is neither false nor misleading, when considered in the light of the statutory provision requiring no more than a revelation of all material consequences which may result from the use of the product in the customary way or under the conditions prescribed in the advertisement. But since the matter is not open, we have no occasion to examine or weigh questions of fact or law, since they are in the first instance within the exclusive jurisdiction of the Commission and its decision when made is subject to challenge only as provided in the Act; nor is there anything in the Declaratory Judgment Act which changes this result or creates new rights or increases or extends the jurisdiction of the courts. *Dochler Metal Furniture Co. v. Warren*, 76 U. S. App. D. C. 60, 129 F. (2d) 43, 45.

We are, therefore, of opinion that the District Court was in all respects correct in holding that it lacked jurisdiction of the subject matter of the complaint.

Affirmed.

DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Civil Action No. 18057

MILES LABORATORIES, INC., PLAINTIFF, *vs.* FEDERAL TRADE COMMISSION—WILLIAM A. AYRES, INDIVIDUALLY AND AS A MEMBER AND CHAIRMAN OF THE FEDERAL TRADE COMMISSION; GARLAND S. FERGUSON, INDIVIDUALLY AND AS A MEMBER OF THE FEDERAL TRADE COMMISSION; EWIN L. DAVIS, INDIVIDUALLY AND AS A MEMBER OF THE FEDERAL TRADE COMMISSION; CHARLES H. MARCH, INDIVIDUALLY AND AS A MEMBER OF THE FEDERAL TRADE COMMISSION; ROBERT E. FREER, INDIVIDUALLY AND AS A MEMBER OF THE FEDERAL TRADE COMMISSION, DEFENDANTS

DECREE DISMISSING ACTION

This cause coming on to be heard upon the complaint and the defendants' motion to dismiss, and the court having fully heard and considered said motion and being of the opinion that it lacks jurisdiction over the subject matter of the complaint for the reasons set forth in its opinion filed herein on the 21st day of June 1943,

IT IS ORDERED, ADJUDGED AND DECREED that the Defendants' motion be, and the same hereby is, granted and that this action be, and it hereby is, dismissed, with costs to be borne by the Plaintiff.

O. R. LUHRING, *Justice*.

Dated at Washington, D. C., this 23rd day of June 1943.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Civil Action No. 18057

MILES LABORATORIES, INC., PLAINTIFF, *vs.* FEDERAL TRADE COMMISSION, ET AL., DEFENDANTS

The plaintiff, an Indiana corporation, is now, and for more than twenty-five years last past has been, engaged in the manufacture, sale, and distribution in interstate commerce of certain medicinal preparations known as "Dr. Miles'

⁷ In this case we had held, on appeal from the National Mediation Board, that its certificate forcing some forty-five "Red Caps" employed in the Union Station in St. Paul, against their will and desire, to be represented as to hours of work, rates of pay, and redress of grievances by the Brotherhood of Railway Clerks, which they were not permitted to join because of their race, was arbitrary and in the teeth of both the word and spirit of the Act. The reversal by the Supreme Court on the authority of *Switchmen's Union, etc., v. Nat. Mediation Board*, decided November 22, 1943, determined that Congress had created a "right" which it had delegated authority to the Board alone to apply and which no court could review.

Nervine," "Dr. Miles Nervine Tablets," and "Dr. Miles' Anti-Pain Pills" with an annual sales in excess of \$300,000, and a good will of more than \$1,000,000.

Its product is packaged and sold in bottles, tins, and cartons, which bear labels containing statements and representations with respect to the conditions of use recommended for the same, the active ingredients, the purposes for which the products are effective and the safe or proper dosage. Specimens of cartons, labels, and package inserts, which constitute the complete packaging of said products, are filed with the complaint as Exhibits A-1 to A-3, inclusive. It is alleged that in this respect the plaintiff complies with all the provisions of the Federal Food and Drug and Cosmetic Act (21 U. S. C. A., § 301 et seq.).

Insofar as the plaintiff advertises these products, their advertisements include one of the following statements: "Full Directions on Package—Read Them" or "Read Full Directions on Bottle."

The defendant, Federal Trade Commission, composed of the individual defendants, acting through its Chief Trial Examiner, notified the plaintiff that its packages, labels, and labeling failed adequately to reveal the potential danger of its products, and submitted a stipulation for the signature of the plaintiff wherein it would admit (a) that excessive use of "Dr. Miles' Nervine" and "Dr. Miles' Nervine Tablets" may result in mental derangement of the user and (b) that excessive use of "Dr. Miles' Anti-Pain Pills" may cause collapse or dependence upon said product and (c) that neither the "caution" appearing on its labels nor the advertisements disseminated by it include warnings to that effect.

The proposed stipulation contains an agreement that the plaintiff will forthwith cease and desist from "disseminating any advertisement pertaining to the preparations Dr. Miles' Nervine and/or Dr. Miles' Nervine Tablets * * * which fails clearly to reveal that said preparation or preparations should not be used in excess of the dosage recommended; that such excessive use may be dangerous, causing mental derangement and/or skin eruptions, and should not be taken by or administered to children"; and, with respect to Dr. Miles' Anti-Pain Pills, from disseminating any advertisement "which fails clearly to reveal that said preparation should not be used in excess of the dosage recommended; that such excessive use may be dangerous, causing collapse and/or dependence upon the drug, and that it should not be taken by or administered to children." However, the proposed stipulation gives plaintiff the option to include such cautions or warnings on its labels and, in such case, the advertisements need contain only the cautionary statement: CAUTION, USE ONLY AS DIRECTED.

The defendants threaten, in event of refusal or failure on the part of the plaintiff to execute the stipulation, to institute proceedings immediately against said plaintiff.

The proposed stipulation entitled "stipulation as to the Facts and Agreement to Cease and Desist" is attached to the complaint and made part thereof and is marked Exhibit B.

The complaint characterizes the claims, demands, and threatened action of the Commission as "illegal, unlawful, arbitrary, and in excess of the powers and authority" vested in it (par. 24), and points out, in paragraph 25, that if plaintiff were to sign the stipulation, its good will would be destroyed and it would be required at great expense to discontinue use of all labels, tins, cartons, and advertising matter now on hand, and to obtain and recall from wholesalers, jobbers, and dealers all of said products in their possession and attach new labeling thereto at an expense to it in excess of Twenty-five Thousand Dollars (\$25,000).

The complaint alleges (par. 26) that if plaintiff refuses to sign the stipulation, it would be (a) subjected to criminal prosecution; (b) required at great expense in money and time to defend; (c) receive adverse and harmful publicity; (d) required at great expenditures of money and time to try issues of fact which defendants are without legal authority to raise and have no jurisdiction to determine, and will suffer undue interference with its business and without means of a judicial determination of defendants' jurisdiction and authority, except at the conclusion of a long drawn-out and expensive proceeding before defendant and (e) if found guilty, be unable to obtain a judicial review if there is any evidence to support the charges, no matter how overwhelming the evidence it introduces to disprove the charges may be.

The plaintiff refused to sign the proposed stipulation on the ground that the actions of the defendants are illegal; and that the action of the Commission and its individual members is beyond the scope of statutory authority; and beyond the power conferred by statute upon the respective offices.

The relief sought is a declaratory judgment pursuant to Section 274 (d) of the Judicial Code, as amended (28 U. S. C. A., § 400) that (a) defendants have no authority to determine the legality of the language used on the labeling of plaintiff's products; (b) that defendants have no authority to force plaintiff to vary such language; (c) that defendants exceed their authority in seeking to compel plaintiff to include in its advertising the warnings demanded by defendants; (d) that defendants have no lawful authority to require plaintiff to include in its advertising warnings concerning consequences which might result in the use of the products contrary to the directions on the labels, and (e) that plaintiff has fully complied with all legal requirements imposed by the Federal Trade Commission Act upon its advertising of its products.

The defendants move to dismiss the complaint on the grounds (1) that this court lacks jurisdiction over the subject matter of the complaint and (2) that the complaint fails to state a claim against the defendants upon which relief can be granted.

By the Act approved September 26, 1914, Congress created the Federal Trade Commission, defined its powers and prescribed its duties. Section 5 of that Act, as amended, (15 U. S. C. A., § 45 (a)), denounces "unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce" and declares them unlawful. The Commission is "empowered and directed to prevent persons, partnerships or corporations (with certain exceptions not material here) from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce."

It is to be noted that while the Congress defined certain of the words used in the Act, it did not undertake to define the expressions "unfair methods of competition" and "unfair or deceptive acts or practices." However, with reference to the latter expression, "unfair or deceptive acts or practices," it did provide that the "dissemination or the causing to be disseminated of any *false advertisement* within the provisions of subsection (a) of this section (15 U. S. C. A., § 52 (a)) shall be an unfair or deceptive act or practice in commerce within the meaning of section 45 of this title" (15 U. S. C. A., § 52 (b)).

The term "false advertisement," for the purposes of sections 52, 53, and 54 of Title 15, U. S. C. A., is defined to mean "an advertisement, *other than labeling*, which is misleading in a material respect" (15 U. S. C. A., § 55). In order to determine whether any advertisement is misleading "there shall be taken into account (*among other things*) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual" (15 U. S. C. A., § 55 (a)).

The dissemination of a "false advertisement" by a corporation otherwise than on the labels carried by its products is an unfair or deceptive act or practice which is declared unlawful and which the Federal Trade Commission is empowered and directed to prevent. The term "labeling" means all labels and other printed or graphic matter (1) upon any article or any of its containers or wrappers or (2) accompanying such article" (21 U. S. C. A. 321 (m)).

It appears that the plaintiff does advertise its products otherwise than by labeling, as above defined, through a publication designated "Miles New Weather Almanac and Hand Book of Valuable Information" "and/or other publications" (Paragraph Two, Exhibit B).

The complaint does not exhibit the Almanac or other publications containing its advertisements but, as we have seen, it alleges that the plaintiff's advertisements include one of the following statements: "Full Directions on Package—Read Them" or "Read Full Directions on Bottle" or other similar cautionary directions. However, the "full directions" on the package or bottle do not clearly reveal the potential danger of the products when excessively used.

The Federal Trade Commission Act (15 U. S. C. A., § 45 (b)) provides that "whenever the Commission shall have reason to believe that any * * * corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such * * * corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint."

A proceeding under this section of the Federal Trade Commission Act is a special statutory proceeding which may only be brought by and before the Commission. There is no statutory provision authorizing such a proceeding to be brought in or reviewed by a District Court. No adversary proceeding between the Commission and the plaintiff could be brought in the District Court for the purpose of determining whether the practices referred to in the complaint and proposed stipulation constitute unfair methods of competition or unfair or deceptive acts or practices in commerce prohibited by the Federal Trade Commission Act. Therefore, unless such jurisdiction is conferred by the Declaratory Judgment Act, the District Court has no jurisdiction to determine issues, either of fact or of law, which would be presented by a proceeding upon complaint by the Commission.

It is well settled that the Declaratory Judgment Act is not in itself a source of federal jurisdiction and did not enlarge the preexisting jurisdiction of the federal courts. *Dochler Metal Co. v. Warren* (Court of Appeals, D. C.), 129 F. (2d) 43; *Utah Fuel Co. v. National Bituminous Coal Commission*, 69 App. D. C. 333, 101 F. (2d) 426; *Actua Casualty & Surety Co. v. Quarles* (4th Cir.), 92 F. (2d) 321.

Furthermore, the action of the Commission in determining that it has "reason to believe" that plaintiff has been or is using unfair methods of competition or unfair or deceptive acts or practices in commerce is a judgment based upon an exercise of discretion, and is the first or preliminary step necessary in assuming jurisdiction. As is well said by Mr. Justice Miller in *Utah Fuel Co. v. National Bituminous Coal Commission*, *supra*:

"To permit judicial review, either by injunction or declaratory judgment, of every procedural, preliminary and interlocutory order or ruling by which a person may consider himself aggrieved, would afford opportunity for constant delays in the course of administrative proceedings and would render orderly administrative procedure impossible. Moreover, it would result in bringing to the courts such an avalanche of trivial procedural questions as largely to monopolize their time and energies. That some injury may result from appellants being forced to await the entry of a final order before securing judicial review is a regrettable but not controlling factor under such circumstances."

The question of the Commission's jurisdiction to proceed will be passed on by the Commission. The plaintiff may raise that question in the proceeding before the Commission and obtain a ruling. If the Commission erroneously assume jurisdiction and issues an order to cease and desist, such an order and the proceedings upon which it is based are subject to review by and only by a Circuit Court of Appeals of the United States. The jurisdiction of that court "to affirm, enforce, modify or set aside orders of the Commission shall be exclusive" (15 U. S. C. A., § 45 (d)).

The plaintiff stresses the inconvenience and cost of requiring it to engage in the trial of a complaint before the Commission. Such an objection is not new and the courts have invariably held that inconvenience and expense of litigation is "part of the social burden of living under government." *Petroleum Exploration, Inc., v. Public Service Comm.*, 304 U. S. 209, 82 L. Ed. 1294; *Bradley Lumber Co. v. National Labor Relations Board*, (5th Cir.) 84 F. (2d) 97, 100, certiorari denied, 299 U. S. 559, 81 L. Ed. 411; *Roche v. Evaporated Milk Assn.*, — U. S. —, decided May 3rd, 1943.

The motion to dismiss must be sustained and it is so ordered.

O. R. LUHRING, *Justice*.

JUNE 21st, 1943.

MR. CASSEDY. Now, I started out just a few moments ago to answer the statement that Mr. Reece made at the beginning of my testimony in regard to the Bromo-Seltzer case, wherein he said that the Food and Drug Administration had approved the label and after that was done the Federal Trade Commission brought proceedings against the Emerson Drug Co.

I am sure, basing my statement upon very reliable information, that Mr. Reece was not informed in that regard by Dr. Dunbar, because my information is that the Food and Drug has not approved the label offered by the Emerson Co. in regard to Bromo-Seltzer.

The Food and Drug instituted a seizure action.

Mr. REECE. If it does not interrupt—and I am not going to make a statement—did not the Food and Drug Administration draw up a label and a caution for the bromide preparations.

Mr. CASSEDY. Yes, sir; it did; and for the acetanilid also. But I point out to you, sir, that they notified the Emerson Drug Co., informing them after they had submitted this label that I have in my hand that it did not meet the requirements.

I have a photostatic copy of the memorandum sent out by Dr. Campbell, who was in charge then, in which they set out the warnings which they seek to require in the matter of bromides and acetanilids, and for acetanilid it provides—

Warning, frequent or continued use may be serious, causing serious blood disturbances, anemia, collapse, or a dependence on the drug. Do not take more than the dose recommended. Not to be given to children.

And in the case of bromides:

"Warning, frequent or continued use may lead to mental derangement, skin eruptions, or other serious effects. Do not take more than the dosage recommended. Not to be taken by those subject to kidney disease."

Now, they wrote to the Emerson Drug Co. regarding Bromo-Seltzer that their proposed label did not meet those requirements.

And I am sure if this committee wants to find out whether that statement is true or not, Dr. Dunbar can give you the answer.

Mr. REECE. If that is in error, at least do not place the responsibility upon Mr. Hoge, because he is not representing Emerson Drug Co., and I did not get my information from him.

Mr. CASSEDY. Well, I do not know how you got it, whether it was Mr. Hoge or not, but the information you have is not correct.

The label that the Bromo-Seltzer people submitted to the Food and Drug Administration is here, and I might say that the way this came about was that after the Food and Drug law of 1938 was enacted, one of the very first proceedings they had, in fact the first proceeding they had under that act, was against a bromide-acetanilid preparation.

The eighty-first proceeding that they instituted was against Bromo-Seltzer. That proceeding was terminated by a judgment in January 1940—the second day of January 1940—in the United States District Court for the Southern District of New York.

I have a photostatic copy of a copy of that judgment.

Mr. RABIN. Is that a civil proceeding?

Mr. CASSEDY. That is a libel proceeding in which a large quantity of the product was seized. The Bromo-Seltzer Co. was called the claimant in that case.

Mr. REECE. In order to indicate that they had attorneys of some standing, it is my information that the firm of Davies, Richberg, Beebe, Busick and Richardson et al. represented them.

Mr. WHITELEY. Not at that time, Mr. Congressman.

Mr. REECE. Somewhere during the course of the proceedings?

Mr. WHITELEY. I think they represent them now before the Commission, but they did not represent them in these libel proceedings, I am quite confident.

Mr. REECE. But they do now?

Mr. WHITELEY. In the Federal Trade Commission proceedings, but not in these court proceedings.

Mr. REECE. I had in mind that they were Emerson's attorneys in these proceedings before the Federal Trade Commission.

Mr. CASSEDY. Now in that in case that was instituted by the Food and Drug Administration in the District Court for the Southern District of New York, these same propositions were raised as are now raised by the Federal Trade Commission in regard to advertising, except that their proceeding was directed toward the labeling.

The label at that time I have here in my hand. It is a small one, while the one they later submitted after this case was over is this one [indicating].

That case was settled, as I understand it, by an agreement with the Bromo-Selter people that they would reduce the amount of acetanilid and the amount of bromides that were contained in that preparation.

They did reduce amounts and change the formula, and then they submitted this label based upon the new formula to the Food and Drug Administration.

Now, it is this label that has never been approved by the Food and Drug Administration, not yet; and I might say that it has never been in accord with the requirements of the Food and Drug Administration in regard to their suggested warnings that they send out in regard to all drugs, as I read a few moments ago.

I wish to point out that the Federal Trade Commission has proceeded against this concern. I filed several copies of the complaint against the Emerson Drug Co., based principally upon their failure to reveal consequences of use of that product as it now exists, after that case was terminated. Now, that case was not litigated. As I understand it, there was no evidence offered. If the committee desires it, I have a copy of the judgment, copies of these labels, copies of these suggested warnings sent out by the Food and Drug Administration, and also the notice of judgment that was sent out by the Food and Drug Administration, that gives the history of the whole proceeding.

Mr. ROGERS. Is this last label in use now?

Mr. CASSEDY. Yes, sir; it is being used now.

Mr. RABIN. I take it, therefore, there is no conflict with respect to policy between your Commission and the Pure Food and Drug in this respect at all?

Mr. CASSEDY. May I point out, sir, that Dr. Dunbar in the long letter that he wrote Congressman Reece, in response to his request to point out the conflicts, if any, that existed, did not point out a single instance wherein we sought to require advertisements to reveal consequences, or wherein we followed the policy that he have been discussing, relating, as Mr. Reece contends, to labeling.

Dr. Dunbar does not point out a single instance wherein that procedure conflicts with the Food and Drug Administration.

Mr. RABIN. But my specific question is this: With respect to the labeling on the Bromo-Seltzer, is there any conflict between the Food and Drug and the Federal Trade Commission?

Mr. CASSEDY. Not at all. We are in exact accord. The requirements they desire on the label are the same as the requirements we contend for in these complaints, exactly the same.

Mr. REECE. That is, you are doing the same thing?

Mr. CASSEDY. We are doing the same thing, yes, in regard to the advertisements, as they are doing in regard to the labeling.

Mr. ROGERS. If they were to comply with this new label, you would have no right of action against them?

Mr. CASSEDY. I cannot answer them. The Commission would have to determine whether or not it would require in this case the advertisements to contain, or rather, to disclose the results which the product may cause.

These are serious results. Mental derangement, dependence, and collapse are not to be thought of lightly.

Mr. SADOWSKI. I think it would be well for the committee to have these labels.

Mr. ROGERS. The witness referred with some other exhibits to the fact that an agreement had been made. If we are going to try this case, let us have all the records or none of them.

That is my thought. It is not fair to us as a committee, I think, to have part of the records and not all of them.

Mr. RABIN. In any event, whether we have all or part, I think those two labels should be identified as used before.

Mr. CASSEDY. I have indicated one as "old" and one as "new."

Mr. SADOWSKI. These two labels, I believe, ought to go in the record. (The labels are as follows:)

[New label]

Net weight, 6 ounces

EMERSON'S BROMO-SELTZER

"Reg. U. S. Pat. Off."

ACTIVE INGREDIENTS

Each heaping teaspoonful contains $2\frac{1}{2}$ grains Acetanilid, 5 grains Sodium Bromide, also Caffeine; Sodium Bicarbonate and Citric Acid, which when dissolved, form Sodium Citrate.

A RELIEF FOR SIMPLE HEADACHES AND NEURALGIA

Dose.—A heaping teaspoonful in half glass of water; if not relieved, repeat after interval of three hours. Do not exceed two doses in twenty-four hours. In persistent or frequent headaches or neuralgia, consult your physician. Not for use by children.

Caution.—If rash, drowsiness in daytime, or any unusual symptoms occur, discontinue use at once. Not for use by those having kidney or other organic disease, unless advised by physician. Do not exceed recommended dosage. Frequent and continuous use may result in serious effects

Price, \$1.20

Keep in a cool, dry place—tightly closed

THE EMERSON DRUG CO. OF BALTIMORE CITY, MD.

[Old label]

Contents, 6 ounces

EMERSON'S BROMO-SELTZER

"Reg. U. S. Pat. Off."

Each heaping teaspoonful contains about 3 $\frac{3}{4}$ grains Acetanilid U. S. P.

A RELIEF FOR HEADACHE AND NEURALGIA

Dose.—A heaping teaspoonful in half glass of water; repeat in an hour if not relieved, or until three doses have been taken within twenty-four hours.

It is not often that the second or third dose is required.

Price, \$1.20

Keep in a cool, dry place—tightly closed

EMERSON DRUG CO.,
Baltimore, Md., U. S. A.

MR. ROGERS. Mr. Cassedy, do you have a complaint against the Emerson Drug Co.?

MR. CASSEDY. Yes, sir.

MR. ROGERS. Does Food and Drug have a complaint?

MR. CASSEDY. No, sir; their case ended in January 1940.

MR. ROGERS. Are they satisfied with the label they now have?

MR. CASSEDY. They are not satisfied, and have so written the Emerson Drug Co.

MR. ROGERS. If they do comply with this new label there, then that takes away the effect of your position?

MR. CASSEDY. No, sir. You must bear in mind, Congressman Rogers, that the Commission, the Federal Trade Commission, seeks to stop the dissemination of these false advertisements that fail to reveal the consequences.

Now, if they reveal the consequences in the advertisements, that would end the Commission's case. If the Commission decides that they may be permitted to use "Caution: Use only as directed" in the event, as you have suggested, that their labeling complied with the Food and Drug requirements, then our case would be ended by following that policy.

MR. RABIN. Let me ask you a question on this point. Let us assume that the Pure Food and Drug Administration comes to an agreement with the Emerson Co. with respect to the contents of the label. I understand they have not yet arrived at that point, but let us assume they do come to an agreement and Emerson Co. is willing to put on that label what the Food and Drug Administration thinks is proper: Would, then, the Commission be willing to follow its former policy and permit the Emerson Co. to make reference, as in the usual case, and withdraw its proceeding, or would it wish to substitute its judgment in place of that of the Pure Food and Drug Administration with respect to what that label should contain?

MR. CASSEDY. I can answer that, I think. Of course, I cannot speak as to what our Commission may do, because that is a matter over which I have no control.

But I will say in my judgment and opinion that would have a great bearing upon what the Commission would do, because the Commission cooperates 100 percent with the Food and Drug Administration.

Mr. RABIN. Would it be controlling as a matter of policy; I do not mean as a matter of law, but as a matter of policy.

Mr. CASSEDY. I feel sure that it would, unless possibly there may be some differences on the facts in this case with regard to the dispensing of the product.

Mr. RABIN. Of course, that makes it a conflict.

Mr. CASSEDY. No; not a conflict.

Mr. RABIN. I mean if there should be a conflict, that would put the finger right on it.

Mr. CASSEDY. The Commission would require the Emerson Drug Co., if the evidence justified it, to reveal these consequences in their advertisements, rather than the labels. That is the point I am making.

Mr. RABIN. I understand that, but would the Commission accept the finding or the agreement of the Pure Food and Drug Administration, and in that respect not compel them to put the consequences in the ad, but permit them to make the reference "Use as per directions"?

Mr. CASSEDY. I feel sure that it would, because the warning suggested by the Food and Drug Administration and the complaint issued by the Commission, are both based upon the consensus of medical science. They both go to the same sources.

I am going to lead up to the discussion, Mr. Reece, which you have made heretofore.

Mr. REECE. In that connection, in the cases that have been disposed of, has the policy to which your attention was recently directed been followed; that is, when the Food and Drug Administration approved a label for the product, that the Commission accepted that label without undertaking to substitute its judgment?

Mr. CASSEDY. The Commission would not substitute its judgment with respect to the labeling, but with respect to the advertising, and in accord with the Food and Drug Act.

Mr. RABIN. Let us understand each other. I know you do not touch labeling, but would the Commission permit them to advertise by the mere reference to the label, "Use as directed," under those circumstances?

Mr. CASSEDY. I think it would.

Mr. RABIN. Well, that is the question, and that is the answer.

Mr. REECE. But has that policy been followed?

Mr. CASSEDY. I am certain that it has. I know of no case where it has not.

Mr. RABIN. All right. That is the answer.

Mr. REECE. Are you quite sure in your own mind that you know of no case in which that policy has not been followed?

Now, I want us to have a clear understanding about that, Mr. Cassey.

Mr. CASSEDY. Yes, sir, because Dr. Dunbar does not point out any. The cases he points out are entirely different.

Mr. REECE. And you stake your reputation as an attorney and as an employee on that statement?

Mr. CASSEDY. Now, I do not understand exactly your view.

Mr. REECE. Before you say "yes" or "no," you ought to understand it.

Mr. CASSEDY. I would like to hear it.

Mr. REECE. You understood Mr. Rabin's question, I am sure?

Mr. CASSEDY. Yes.

Mr. REECE. And he was referring to the probable action of the Commission in the Emerson Drug Co. case in the event the Emerson Drug Co. agreed to the warnings, to the label and the warnings, which had been drawn up by the Pure Food and Drug Administration. And it was your statement that while you could not answer for the Commission, you felt that that would be controlling and would be accepted by the Commission, in the disposition of that case.

There are other cases that have been disposed of, many of them. In those cases, those that have been disposed of, which are not now a matter of conjecture, but a matter of fact, have the label and the warnings agreed upon or suggested by the Food and Drug Administration and accepted by the companies satisfied the Commission; without the Commission, before final disposition of the case, drawing up a label of its own which was required to be used instead of the label which the Food and Drug Administration had suggested?

Mr. CASSEDY. Mr. Reece, I can answer that generally, yes. But there are some instances where, for instance, the Food and Drug Administration might not accomplish all that it desired in one proceeding against a label, and thereafter filed a succession of cases—in other words, more than one—to follow it up and accomplish their full desire in that regard by several proceedings.

So you cannot pick out just one and say that that fixes the rule in regard to that product, and say that the Commission would agree to it over here in another specific case. But they both aim toward the same end. They are both based on the same science. They go to the same medical sources.

Mr. REECE. We are discussing this as a matter of policy.

Mr. CASSEDY. I think that their purpose is to accord 100 percent with each other. In my opinion, that is accomplished in 99 percent of the cases. There may be a small segment where it is necessary to have more than one case to accomplish the purpose.

Now, I have labels from the products referred to in those complaints which have been filed here, the Miles Anti-Pain pills, the Nerve tablets, and Miles Liquid Nerve and the Capudine product, that contain the warnings or reveal the consequences to some extent thereon, but not to the extent of revealing the consequences which we allege are necessary in these complaints.

If they would be of any benefit to the committee, I have them here. Whether you want them or not, I cannot say.

Mr. ROGERS. Are they all satisfactory to the Food and Drug Administration?

Mr. CASSEDY. None of them is satisfactory to the Food and Drug. That is the reason I am filing them.

Mr. SADOWSKI. These are all in controversy and have relation to those complaints that you spoke of?

Mr. CASSEDY. Yes; the complaints, of course, that we have issued, allege that they do not reveal these consequences in the advertisements.

Mr. REECE. Then it would seem to me that the effect of this compilation of insufficient warnings which you are submitting to the committee is intended to mean, or does have the effect of indicating, that the Food and Drug Administration is derelict in the performance of its duties, and another agency must come forward to protect the public?

Mr. CASSEDY. Mr. Reece, again, I cannot speak for the Food and Drug Administration. They have their representatives to speak for themselves.

Mr. DAVIS. Mr. Chairman and gentlemen of the committee, may I interpose a statement here?

Mr. SADOWSKI. All right, Judge Davis.

Mr. DAVIS. The Food and Drug representatives have more than once announced that a great deal of work was imposed upon them during the war by war agencies, and all agencies of the Government were directed to aid the war agencies in the war effort in any way they could, and give priority to such work; and that they had been unable to keep current their survey and action with respect to labels, and that they would resume all of their work as soon as they could.

I believe they have announced that they now have entered upon that work. Now, you understand there are new medical preparations coming out all the time, and the manufacturers are modifying what they have and changing the name. They are coming out with maybe the same product under a different name, produced by a change in name of the company or a new company.

So there have been a number of these new products that have come out during the war, in which the Food and Drug Administration have not been able—and that is no criticism at all of them, for they have been performing what were directed as more important duties—to keep abreast, and have not passed upon what labels should be placed upon those products.

Certainly it is not expected that the Federal Trade Commission, which has exclusive control over advertising, should just stop because the Food and Drug Administration, for the reasons stated, have been unable to approve labels with respect to some of these products.

Now, in doing that, in proceeding under its act, the Federal Trade Commission is in no sense trespassing upon the Food and Drug Administration. It is not undertaking to determine what labels the Food and Drug Administration should approve.

But it wants to stop what it has reason to believe are false representations in the advertising itself. In many instances the drugs advertised are dangerous. Facts are being concealed in violation of the statutes.

So I think there perhaps have been a few instances where the Commission has proceeded against the advertising in advance of the Food and Drug Administration having been able to deal with the question of labels, which they have told us and told the public they will get to just as quickly as they can.

Mr. ROGERS. Judge, the Federal Trade Commission, of course, has exclusive jurisdiction with reference to advertising.

Mr. DAVIS. Yes, sir.

Mr. ROGERS. Suppose that, under the Food and Drug Act, they put a label on the medicine, or whatever the article is, that contains everything that you would require in an advertisement: Will you still go forward with the advertising, if it is all on the label?

Mr. DAVIS. Yes. Because the consuming public generally does not know what is on the label. The consuming public does not know until they pay their money for the product, break it open, and see the label.

In other words, as the courts have so frequently discussed, the initial advertising is a primary incentive to purchase the article. We think before they are induced to purchase this or that medicinal preparation, upon the strength of a radio or publication advertisement, if we have reason to believe that it is dangerous or potentially dangerous to health, that the advertisers should at least state in what respects it is dangerous; or, in the alternative, as we frequently permit them to do, say, "Caution: Use only as directed."

Permission to use the cautionary statement was at the instance and at the request of the advertisers themselves, who came with tears in their eyes and said, "We think it is too hard on us to require us to set out the full warnings in the advertising, over the radio or in the newspapers."

We then agreed. And it was a great concession to them. I want to say that, in spite of this effort to confuse the situation, it was a great concession to them to permit them to do that.

Mr. REECE. Since Judge Davis is directing his attention to this conflict phase of the case, may I read a statement from the letter which Dr. Dunbar wrote, dealing with this subject, under date of July 13, 1945, and which is part of the record? Dr. Dunbar says:

Impairment of consumer protection arises through undue delays in the settlement of issues caused by quality of jurisdiction. As an illustration, this Administration conducted long and costly scientific investigations of Carter's Little Liver Pills through nationally recognized authorities in the field of physiology, pharmacology, and medicine; and, on September 25, 1943, instituted seizure proceedings, alleging that the labeling of the pills was false and misleading. The Commission was interested in the advertising representations for the product which were the same as those in the labeling, and was kept advised of the results of the investigations as they developed. Some 4 months before the seizure was made the Commission filed a complaint against the manufacturer. The seizure action was set for trial in January 1944. Prior to that time the manufacturer sought an injunction restraining the Commission from proceeding with hearings on its complaint until final judgment had been rendered in the seizure action.

That is, by the Food and Drug Administration.

The court refused the injunction and the Commission's hearings began on November 15, 1943, and have been held intermittently, the latest hearing, according to the Commission's docket, having been held on June 13, 1945. The court in which the seizure action was filed has continued to grant postponements pending the completion of the Commission's hearings. Had the seizure action been permitted to go to trial it would undoubtedly have been terminated within a few weeks and in all probability the judgment would be final by this time even if appeals had been taken.

Mr. DAVIS. I will ask the chief counsel with respect to that.

Mr. KELLEY. I am not familiar with the details, but that was a very hotly contested adversary proceeding. In another hearing on another matter several years ago, before a committee of the Congress, one or two of the Commissioners answered statements. Later, in a case that we had pending, a very big case, which comes up for decision on the merits on the 16th of next month, we had to argue up there in our brief their charges that the Commission was disqualified because they had prejudged the case by making statements before the committees of Congress.

For that reason, I think here that I had better answer these questions, because that case is before Judge Davis, as one of the Commissioners, for decision.

The point is this: The Commission believed that it was in the public interest, and that the facts that it had before it showed that the advertisement of the Carter Little Liver Pills Co. with respect to its product was in violation of the Federal Trade Commission Act.

The law says that if the Commission shall be of that opinion, it shall issue a complaint: It did issue the complaint. It is true, too, that the Food and Drug was of the opinion that the Carter people had violated the food and drug law.

The Commission went ahead with its case. I had conferences with the United States district attorney in New York in charge of the Carter case. The matter was before Judge Knox. It was brought up as to whether they would continue or we would go ahead. It was agreed that we would go ahead.

I want to say that that has been one of the most hotly contested cases that we had in the drug field. From coast to coast and back again and back again have they gone, taking thousands of pages of testimony.

MR. REECE. But with the result which Dr. Dunbar describes as follows:

The distribution of the alleged misbranded product has been continued throughout this period and will undoubtedly be continued until the seizure case is tried and the judgment becomes final.

Now, Judge, if I may say so, I am not questioning your right, but the propriety of the law permitting a policy of that kind.

MR. KELLEY. But I would suggest, as this is a very serious matter, that you call the United States district attorney, the men over in Justice that had charge of that matter, and Mr. Dunbar.

Now, I will make a prediction right here and now that the Food and Drug would not have finished that case as soon as the Commission. And I will make this further prediction as long as Dr. Dunbar is indulging in it, that if they did they would have lost it.

MR. REECE. But as I understand, the Food and Drug Administration has three courses of action which it follows in such cases: An action in rem—that is, a seizure of the product—an indictment, or an injunction, either of which is brought in the United States court.

MR. DAVIS. Mr. Chairman, the discussion has gone off on an entirely different proposition by reason of the interjection of Congressman Reece. Upon the matter under discussion, I was undertaking to explain, to answer, a question propounded by Congressman Rabin.

Now, when I go on the stand, I shall undertake to deal fully with the question of alleged conflict. I think I can show you there is no conflict in fact between the Food and Drug Administration and the Federal Trade Commission as to either the law or the operation. The question as to who can get action quickest is a different proposition. Of course, a man can go out and seize products quicker than the Federal Trade Commission can act. As Congressman Reece well said during the consideration of the Wheeler-Lea amendment, it is a summary proceeding, whereas the Federal Trade Commission is a quasi-judicial tribunal and proceeds according to law, and as Congressman Reece said, "Gives a man his day in court."

Of course, that proceeding is not as quick as a proceeding that does not proceed that way. Now, the suggestion or opinion of Dr. Dunbar that within a few months they could have settled that case is a mere opinion of his.

Then they would have had the right of appeal, to the circuit court of appeals, and then as to certiorari to the Supreme Court.

Certainly when the matters get into court, there is no difference, except that our statute specifically provides that the Federal Trade Commission cases in the circuit courts of appeals shall be given precedence over all other cases and shall be expedited in every manner possible.

MR. REECE. If you will permit, Judge, since you referred to what I said before, I would like to read a few sentences:

The bill amending the Federal Trade Commission Act and dealing specifically with advertising is before you for action. It is to be followed by a food and drug bill, which I, as a member of the subcommittee believe will give the Food and Drug Administration of the Department of Agriculture ample authority with which to effectively regulate and control the food, drug, device, and cosmetic industries.

MR. DAVIS. Yes; that is right. I think, by the way, you made a very fine speech on that bill.

MR. ROGERS. Judge, there is just one other matter that I think you could clarify for me: Now, you say you have exclusive jurisdiction in the Federal Trade Commission on advertising?

MR. DAVIS. Yes, sir.

MR. ROGERS. Now, will the passage of the Reece bill take away that power?

MR. DAVIS. Well, it would in part.

MR. RABIN. Mr. Rogers, I think the passage of this bill may let the advertisers ride right through the middle.

MR. DAVIS. I will explain in what respect it will when I get to the question.

MR. SADOWSKY. Mr. Cassedy, you may proceed.

MR. CASSEDY. I have but very little more, and if you will permit me to go along now without so many questions, at least until I get through with a subject, I think I can go right fast.

Now, Congressman Reece has mentioned on several occasions the fact that the Food and Drug Administration has a laboratory and is better equipped to deal with therapeutics than the Federal Trade Commission.

I want to point out to both Congressman Reece and to the other members of the committee, that they do have a laboratory over there that is a fine one. In that laboratory, they make bacteriological tests, they make pharmacological tests, and they make chemical analyses of any type of products, usually foods, drugs, and cosmetics. I do not know about devices. I want to say further that the Federal Trade Commission not only has access to that laboratory just as much as they do, but they do use it and have used it on many occasions and properly compensate the Food and Drug for such use.

Now, with reference to therapeutics. Therapeutics, as I understand it, means the action and effect of drugs on persons. We have the same sources to get material with regard to therapeutics as the Food and Drug Administration. They do not deal with therapeutics in that

laboratory, and their doctors, or chemists, or whoever they have over there, do not testify as witnesses.

They do similar work to that done by the two doctors and the chemist that we have at the Federal Trade Commission in our Medical Advisory Division. I want to point out, if I may, the sources of material in any case involving these products, which we both have, that is, both the Food and Drug Administration and the Federal Trade Commission.

There is no difference. The scientific facts about the nature of foods, drugs, cosmetics, and devices are obtained for legal use from the following sources:

1. What the manufacturer or advertiser represents his article to be.
2. From the label and labeling, in which is required by law to be listed all active ingredients of a drug, and the amount of certain of these ingredients, and all of the ingredients of foods for which official standards of composition have not been officially determined and published.

3. From the extensive, official and unofficial compendia of drugs.

And I might name those: The United States Pharmacopoeia, and the National Formulary, are the official compendia. There are many nonofficial compendia. One of them that is very prominent is called, New and Nonofficial Remedies, published by the American Medical Association.

4. From the available results of the many analytical laboratories which have in the past extensively examined and analyzed these commodities.

5. From the extensive scientific literature which deals with these commodities.

6. From personal or other contact with individuals or groups who have made scientific studies or conducted investigations on these commodities.

7. From reports of scientists in our schools and hospitals who volunteer assistance in the study of these commodities.

8. From scientists in our schools and hospitals who agree to make such studies on the basis of compensation by the Commission.

9. From reports of studies made by the Bureau of Standards which are compensated for by the Commission.

10. From such reports made by the United States Public Health Service. The Commission compensates for such service.

11. From such reports made by the Food and Drug Administration.

Foods, drugs, cosmetics, and devices cannot be extensively advertised and attain wide distribution at this time unless at least their general composition and nature is revealed by the manufacturer or advertiser or is otherwise readily obtainable. For the newer food and drug preparations scientific literature almost always reveals adequate information with respect to their composition and identity.

The therapeutic or other effects of a food, drug, device or cosmetic are obtained from the following sources:

1. The vast scientific reports giving the results of use of the article or of preparations of entirely comparable composition.

2. Personal and other contacts with those scientists who are outstanding experts whether they are attached to our universities or hospitals or privately employed or are in the employ of local, State, or

Federal Government—city, county, and State health departments, boards of pharmacy, United States Bureau of Standards, United States Public Health Service, Food and Drug Administration, Bureau of Animal Industry, Bureau of Agricultural and Industrial Chemistry, Bureau of Human Nutrition and Home Economics, and other similar agencies of Government.

3. And the vast store of recorded scientific testimony dealing with therapeutics in its broadest sense where experts have related under oath facts and opinions with respect to these commodities and have been subjected to adequate cross-examination.

In the Federal Trade Commission the Director of the Medical Advisory Division during the past 17 years has participated in the preparation of the scientific phases of literally thousands of cases brought before the United States district courts—that is, while he was in the Food and Drug Commission—and the Federal Trade Commission—since he left that Commission—involving foods, drugs, cosmetics, devices, labeling, and advertising—and has had an unequalled opportunity to study the vast amount of expert scientific evidence presented in these cases—pharmaceutical, chemical, bacteriological, pharmacological, and clinical. This source of information about therapeutics and therapeutic evidence is invaluable in making accurate cases before the Commission, and when such accurate evidence is finally introduced into the records it is quite conclusive and difficult to surmount.

The Medical Advisory Division's principal chemist has during the past 14 years had similar opportunities in his special fields of the chemistry of foods, drugs, and cosmetics and in the broad field of human and animal nutrition.

I might say the chemist at the Commission has been with the Commission about 7 years, and I understand about 7 with the Food and Drug Administration.

The entire vast storehouse of scientific information and opinion available in this country with respect to the therapeutic and other effects of foods, drugs, cosmetics, and medical devices is readily available to the Federal Trade Commission through its Medical Advisory Division on exactly the same basis and to the same extent as it is available to the Food and Drug Administration for use in its procedure or to the United States district courts when trying cases brought under the Food, Drug, and Cosmetic Act.

Now, I want to point out one thing about my practical experience in dealing with that subject in these cases that I have mentioned, the Bromo-Seltzer case, the Miles Laboratories case, the Larned Corp. case, the Capudine Chemical Co. case, and some others involving medicinal preparations.

Through those sources that I have named we have compiled large volumes, for instance, of the scientific literature dealing specifically with bromides and acetanilid. On the basis of that scientific literature you not only have an opportunity to study the therapeutics, or rather the therapeutic effects, but you have the opportunity also to study the toxic effects that are harmful or poisonous to the human system, and to study the literature not only favorable to the Commission's interest but also contrary to the Commission's interest.

On the basis of the consensus of such scientific evidence, the Commission proceeds.

Now, when any comparison is drawn between the Commission's procedure that goes into therapeutics and the Food and Drug procedure that goes into therapeutics, I would say that the Commission would have the same sources that the Food and Drug Commission has.

They go out into the field and get the best scientists in whatever subject they are interested. So do we, no matter where they are. I might say that as to the Larned Corp., I have the testimony taken at San Francisco on May 11, 1945, with regard to acetanilid.

One of the outstanding experts of the United States, Dr. Paul Hanzlik, testified in that regard. I also have, in the Larned case, the testimony taken at Los Angeles, of Dr. Sheldon Payne, one of the outstanding experts, testifying there.

Dr. Payne was for years connected with the Duke University Hospital in North Carolina and is now practicing medicine out there.

Mr. REECE. What is his specialty at this time?

Mr. CASSEDY. His specialty? He now deals with women's diseases.

Mr. REECE. What phase of women's diseases?

Mr. CASSEDY. Mr. Congressman, you may have the copy of the testimony if you like, and the committee may have an opportunity to determine what his evidence is all about. He is fully qualified.

Mr. REECE. I do not know. What was the particular subject on which he was testifying?

Mr. CASSEDY. About the therapeutic effects and toxic effects of acetanilid, and in some regard as to bromides, based upon work that he had done over a period of several years at the Duke University Hospital.

Mr. REECE. Does the record reveal the particular type of women's diseases in which he is now applying himself as specialist?

Mr. CASSEDY. Yes, sir; but that has nothing to do with the subject of bromides or acetanilid.

Mr. REECE. I did not know his name, but I had read something indicating his specialty now is far from dealing with that subject.

Mr. CASSEDY. But his testimony was based upon his outstanding experience, which is highly regarded in the medical world, dealing with acetanilid. He was connected, in fact, with the leaders of the whole scientific field in that regard.

Now, I have also the testimony of Dr. Max Levin, a Johns Hopkins man who was with the Phipps Institute for a number of years over at Baltimore, who testified in the Capudine case with regard to bromides producing mental derangement.

Mr. REECE. Mr. Chairman, could I take just a minute?

Mr. SADOWSKI. Just a moment, Mr. Reece. Have you concluded your statement, Mr. Cassedy?

Mr. CASSEDY. I have reached the point of discussing Dr. Dunbar's letter. May I file this with the committee for its use?

Mr. SADOWSKI. Yes.

(The letter is as follows:)

FEDERAL SECURITY AGENCY,
FOOD AND DRUG ADMINISTRATION;
Washington, D. C., July 13, 1945.

HON. B. CARROLL REECE,

House of Representatives, Washington 25, D. C.

DEAR MR. REECE: Let me apologize for the delay in replying to your letter of June 14, which is due in part to its failure to reach us until June 21. You refer to Administrator McNutt's letter of May 3 to Chairman Lea on H. R. 2390 and

ask for a further statement of the difficulties referred to in the Administrator's letter that have arisen from the differing procedures and divided responsibility for determining the truth or falsity of identical representations in labeling and advertising.

At the outset let me assure you of my heartiest sympathy with your purpose of introducing the bill. I know you had in mind the elimination of duplication and conflict that impair consumer protection and create confusion in the regulated industries.

My own views on the character of legislation needed to accomplish this purpose have not changed since our recommendations were made to the Congress in connection with the bill which became the Federal Food, Drug, and Cosmetic Act. In a statement to the Senate Committee on Commerce in March 1935, Mr. W. G. Campbell, who was then Chief of the Food and Drug Administration, said:

"If I may, with propriety, refer to the recommendations of the proprietary-medicine manufacturers, the spokesman for certain advertising media, and the Chairman of the Federal Trade Commission, to assign to that organization the enforcement of the advertising provisions of the act, I will say that I am more concerned in the enactment of a law whose terms are adequate for the protection of the consuming public than I am the designation of the governmental body by which it will be enforced. I urge that there be no division of responsibility in the control of adulteration, misbranding, and false advertising of food, drugs, and cosmetics. These three offenses are too intimately interwoven to permit effective treatment separately. The briefest of administrative experience is sufficient to condemn divided administrative authority. Such an arrangement presumes continued harmonious cooperative relationship which cannot possibly exist indefinitely. Any impairment of such relationship will be reflected in the inefficient enforcement which will inevitably result. If the Federal Trade Commission is qualified to administer this law more satisfactorily than the Food and Drug Administration, transfer all phases of its enforcement to that body. As a preliminary to such action I urge also that modification be made of the procedure imposed on it in the act for regulation of trade practices. The issuance of orders to cease and desist is not sufficient to suppress false advertising or to prevent the marketing of adulterated and misbranded articles. So long as an offender realizes that he is free from a visitation of penalties until after he shall have received an invitation to desist, there will be a total absence of incentive voluntarily, through fear or otherwise, to comply with the law. There is need for the exercise of a deterring influence."

Events have abundantly confirmed Mr. Campbell's predictions, except that inharmonious relations have not developed. There has been a free interchange of information between the Federal Trade Commission and the Food and Drug Administration. In some cases scientific investigational work has been done for the Commission in the Administration's laboratories, since the Commission is not equipped with laboratory facilities. But inevitably, there have been differences of opinion between the two agencies in evaluating scientific evidence essential to the control of the regulated commodities, and in determining the meaning to the public of advertising and labeling claims.

Some of the more serious difficulties arise from such differences of opinion. These have occurred with respect to many products, but only a few illustrations will be given. The Willard Tablet case is one. On April 8, 1937, the Commission filed a complaint against the Willard Tablet Co., alleging that the advertising representations concerning Willard Tablets were false. On January 5, 1939, the Commission issued a cease-and-desist order. No appeal from the order was taken and the company submitted a report of compliance, receipt of which was acknowledged by the Commission on April 7, 1939.

In November 1942 we instituted a seizure action under the Food, Drug, and Cosmetic Act against a shipment of Willard Tablets alleging on the basis of what we considered to be conclusive scientific proof that the representations in the labeling were false and misleading. These representations were identical with those submitted in the report of compliance to the Commission. Both the district court and the circuit court of appeals held that the doctrine of res adjudicata applied and that action under the Food, Drug, and Cosmetic Act was barred. In its decision the circuit court said:

"We, therefore, have the incongruous situation of one branch of the Government approving the method now pursued by the claimant and another branch seeking to condemn. This is, to say the least, placing claimant in an embarrassing situation and should be avoided if possible" (141 F. (2d) 141, 143).

This decision does not, of course, prevent action by us against those competitors of the Willard Co. who have not received cease-and-desist orders. We are now confronted with the question of the propriety of attempting action under the Food, Drug, and Cosmetic Act against a large number of antacid preparations, of which the Willard product is typical, bearing label representations which, by analogy at least, have been sanctioned by the Commission in the Willard case. Certainly such proceedings would place these competitors at a grave disadvantage. Yet our failure to proceed would be prejudicial to those consumers who rely upon the extravagant and misleading therapeutic label claims. This situation is by no means limited to the field of antacid drugs.

Another similar case arose from the proceedings instituted by the Commission in March 1936 against the distributors of Capon Springs Water, the composition of which is essentially the same as that of Washington, D. C., tap water. It was alleged that advertising of the product as a cure for some 52 different diseases was false. In January 1938 the Commission ordered the distributors to cease and desist from representing that Capon Springs Water alone will cure these 52 diseases. The order was appealed to the circuit court of appeals, which, in its opinion, plainly invited full and final litigation of the extent of the therapeutic value of Capon Springs Water. Said the court (107 F. (2d) 516, 517):

"We are sustaining the particular order of the Commission solely because of its limited scope. We are not constrained to and therefore do not pass upon the wider controversy implicit in the subject. The dispute over balneal therapeutics has raged in the medical profession and inevitably, therefore, in the courts, ever since the Romans began 'taking the waters.' * * * As we understand, it still rages and should, we think, be legally, at least, put to rest by a properly prepared case. Because if these so-called mineral waters are not of any independent therapeutic value, *the public should be protected against assertions otherwise*. If, on the other hand, they do possess separate curative properties, their use and so their advertising should be encouraged." [Italics supplied.]

Again at page 518:

"The Commission's order is surely the most gentle exercise of its power extant. It as most compelled the petitioners to cut their advertisements to the testimony of their own physician experts. They were ordered to cease and desist from 'representing directly or by implication that the use of said water alone either externally or internally will cure' 52 named diseases ranging from nephritis to chronic pneumonia (whatever that is) and from poison ivy to sterility."

Finally, at page 519:

"Although this may be our feeling about the order we are affirming, there does not seem to be anything we can do about it. Our function is, of course, not nisi prius, and although not strictly appellate is confined by the statute to the enforcement of, or refusal to enforce, the Federal Trade Commission's orders (15 U. S. C. A., sec. 45 (d)). In the latter aspect, as the greater includes the lesser, we may modify. We cannot, however, sponte sua do what we have not been asked to do."

The respondents thereafter submitted a report of compliance to the Commission which contained a form of sample advertising.

In June 1943, after finding a shipment of Capon Springs Water accompanied by labeling bearing representations substantially the same as those in the sample advertising contained in the report of compliance, this Administration instituted a seizure action against the shipment alleging that these representations were false and misleading. After trial of the issues, the court in February 1945 ordered dismissal of the libel on the ground that the Commission's order was res adjudicata against the Government. We have recommended to the Department of Justice that this decision be appealed.

That a prior adjudication adverse to the Government under food and drug legislation may estop the Commission from the exercise of its power is shown by what occurred in the matter of Lee's Gizzard Capsules. A seizure was instituted in 1934 under the Food and Drugs Act of 1906 against this product, the labeling of which was alleged to be false and fraudulent. The court held the labeling to be neither false nor fraudulent. In June 1936 the Commission issued a complaint against this firm alleging that advertising representations for Gizzard Capsules identical with those involved in the labeling of the seized product were false. The order of the Commission to cease and desist from such advertising representations was appealed to the circuit court of appeals, which held that

the doctrine of *res adjudicata* precluded action by the Commission (113 Fed. (2d) 583). We know of no other instance wherein the Commission was held to be barred from action because of a prior unsuccessful proceeding under the Food and Drugs Act of 1906 or the Federal Food, Drug, and Cosmetic Act.

Prior to the Willard Tablet case this Administration developed, and the Department of Justice prosecuted successfully, a number of cases alleging that label representations were false and misleading when the same representations in advertising had been considered by the Commission and not found objectionable.

On August 30, 1935, the Commission filed a complaint against W. Gordon Pervis, Tennille, Ga., charging that the respondent had falsely represented his metal plates for use in shoes as a cure for high or low blood pressure, headache, asthma, paralysis, kidney trouble, and other ailments. On October 14, 1936, the Commission dismissed its complaint "for the reason that the evidence adduced does not sustain the allegations of the complaint." In 1940 we instituted criminal proceedings against Pervis for the interstate shipment of the same device misbranded by the same representations which had formed the basis of the Commission's complaint. On November 12, 1940, the jury returned a verdict of guilty and the court imposed a fine of \$1,000 and a suspended jail sentence of 6 months.

Another instance of this kind involved preparations represented for the treatment of obesity. On March 12, 1940, the Commission filed a complaint against Sekov Corp. et al., of Hollywood, Calif., alleging that its advertising of Sekov Reducer for obesity was false. The Commission found that Sekov Reducer "constitutes a treatment for obesity only when used by persons suffering from hypothyroidism." This Administration had previously instituted seizure proceedings against a shipment of Marmola Prescription Tablets, a product of essentially the same composition as Sekov, alleging that the label representations of the product as a treatment for obesity were false and misleading. The court condemned the goods and, in its opinion filed February 23, 1943, found specifically that "obesity is not caused by hypothyroidism" (48 F. Supp. 878, 886).

The need for especially stringent control of drugs containing thyroid was clearly enunciated by the district court:

"Any drug, which for safety in its use requires diagnosis and evaluation, and when taken in the dosage and with the frequency recommended and suggested in its labeling, may expose the users to disease and pain, is dangerous to health. Marmola is such a drug. In it there is an inherent and potential danger that may reasonably be expected to attend its use when one considers that it will be used by the strong, the weak, the old, the young, the well, and the sick, without first having a physical examination or a diagnosis of their condition by a competent physician."

This judgment was affirmed by the circuit courts of appeals (142 F. (2d) 107). Certiorari was denied (65 Supreme Court 68).

Another type of impairment of consumer protection developed in cases against Ayds Candy, which is labeled and advertised as a remedy for obesity. In 1940 and 1941 four seizures were made of this product alleging its labeling to be false and misleading. A default decree was entered in each case. On January 29, 1943, the Commission filed a complaint against the manufacturer, The Carlay Co., and its president and treasurer, Carl A. Futter, alleging that the advertising of the product was false, and on October 18, 1944, issued a cease-and-desist order enjoining such advertising. In February 1944 a criminal action under the Food, Drug, and Cosmetic Act was filed against the same defendants. They appeared and claimed constitutional immunity on the ground that Futter had testified in the proceeding before the Commission. In September 1944 the court sustained the defendants' pleas and they were discharged.

Impairment of consumer protection arises through undue delays in the settlement of issues caused by duality of jurisdiction. As an illustration, this Administration conducted long and costly scientific investigations of Carter's Little Liver Pills through nationally recognized authorities in the field of physiology, pharmacology, and medicine, and on September 25, 1943, instituted seizure proceedings alleging that the labeling of the pills was false and misleading. The Commission was interested in the advertising representations for the product which were the same as those in the labeling, and was kept advised of the results of the investigations as they developed. Some 4 months before the seizure was made the Commission filed a complaint against the manufacturer. The seizure action was set for trial in January 1944. Prior to that time the manufacturer sought an injunction restraining the Commission from proceeding with hearings

on its complaint until final judgment had been rendered in the seizure action. The court refused the injunction and the Commission's hearings began on November 15, 1943, and have been held intermittently, the latest hearing, according to the Commission's docket, having been held on June 13, 1945. The court in which the seizure action was filed has continued to grant postponements pending the completion of the Commission's hearings. Had the seizure action been permitted to go to trial it would undoubtedly have been terminated within a few weeks and in all probability the judgment would be final by this time even if appeals had been taken. The distribution of the allegedly misbranded product has been continued throughout this period and will undoubtedly be continued until the seizure case is tried and the judgment becomes final.

Efficient enforcement necessitates constant planning so as to concentrate action on those offenses that constitute the greatest impairment of public welfare. The extent, character, and timing of our actions on any group of foods, drugs, or cosmetics are determined by the relative seriousness of the adulterations and misbrandings in that group, irrespective of the character of advertising relating to it. Serious adulterations and misbrandings may not be accompanied by serious false advertising, nor is serious false advertising necessarily accompanied by serious adulterations or misbrandings. That there can be no substantial uniformity in the over-all enforcement plans of the two agencies with respect to the same misrepresentations is clear from the fact that actions against such identical misrepresentations constitute only a limited portion of the duties of each agency.

It follows that the enforcement plans of the Food and Drug Administration and those of the Federal Trade Commission may call for differing emphasis and timing of operations on the same commodity group. We have had caustic complaints from industry representatives concerning the lack of uniform enforcement with respect to the same representations in labeling and advertising. The attached copy of letter from Mr. Cary Piowaty, of the Florida Lime and Avocado Growers, Princeton, Fla., is in point.

Under section 5 of the Federal Trade Commission Act, as amended by the Wheeler-Lea Act, the Commission is empowered and directed to prevent the use of "unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce." One form of exercise of this power is illustrated by the enclosed "Trade Practice Rules for the Tuna Industry," promulgated June 23, 1945. You will note that these rules govern, among other things, the advertising, labeling, and composition (which of course is within the field covered by various definitions of adulteration in sec. 402 of the Food, Drug, and Cosmetic Act) of canned tuna. Of particular interest are the standards prescribed in rule 1 and the effect they may have on the formulation and validity of standards we expect to provide for canned tuna under section 401 of the Food, Drug, and Cosmetic Act. Investigations necessary to the formulation of such standards were suspended at the beginning of the war, but will soon be resumed. As you know, our food standards must "promote honesty and fair dealing in the interest of consumers," and for that purpose would necessarily include important provisions omitted from the Commission's standards, such as a limitation on the oil or brine added and a specific minimum for fill of container. Furthermore, our standards would fall far want of certainty unless drawn with greater precision than those in the enclosure.

We do not seek to attack the validity of these rules or question the propriety of their promulgation as a legitimate exercise of the Commission's authority to restrain unfair trade practices. Our experts assisted the Commission in compiling the facts which form the basis of the rules. We cite this example merely as a further illustration of confusion to the prejudice of the public which emanates from the duality of jurisdiction. Since it is obvious that our standards must differ from those of the Commission the question arises as to whether the prior existence of the Commission's standards will interfere with the formulation or jeopardize the validity of ours. More than a possibility of such adverse effects exists, notwithstanding the provisions of section 701 (d) of the Federal Food, Drug, and Cosmetic Act.

A further cause of confusion and consequent impairment of consumer protection results from the absence of deterrent effect inherent in the administrative cease and desist procedure. Competitors of those firms who have been ordered to cease and desist know they can continue the forbidden practice until they themselves receive such orders. Because the procedure is cumbersome and time-consuming the offense may be long continued, whereas, if the original proceedings were penal and tried in courts of law a single decision would have a far-reaching influence toward general compliance. That the Federal courts are

well qualified to pass on the truth or falsity of representations made for foods, drugs, and cosmetics has been abundantly demonstrated by the record in thousands of actions involving misbranding brought under the Food and Drugs Act of 1906 and the Federal Food, Drug, and Cosmetic Act of 1938.

I shall be delighted to be of all possible assistance to you in your purpose to eliminate difficulties that have characterized the administration or legislation for the control of foods, drugs, and cosmetics. When the Congress decided in 1938 to delete the advertising provisions from the food, drug, and cosmetic bill, we accepted the decision philosophically. I am not arguing that regulatory control of these commodities be combined under any particular agency.

The important thing is the character of the control legislation. In my judgment it should provide for similar procedures against the offenses of adulteration, misbranding and false advertising so that allegations on all three can be combined in a single action when the facts warrant; it should provide that the issues be tried initially in the Federal courts; it should prescribe such penalties as will create an incentive to compliance; it should vest clear responsibility for enforcement in a single agency; it should not interfere with the operation of existing legislation to control unfair practices that do not come within the statutory definitions of adulteration, misbranding, or false advertising.

Sincerely yours,

P. B. DUNBAR,
Commissioner of Food and Drugs.

Mr. SADOWSKI. The committee will meet in this room tomorrow morning at 10 o'clock to continue the hearings.

(Thereupon, at 12:15 p. m., the committee recessed, until 10 a. m., Friday, March 8, 1946.)

AMEND FEDERAL TRADE COMMISSION ACT

FRIDAY, MARCH 8, 1946

HOUSE OF REPRESENTATIVES,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D. C.

The subcommittee reconvened at 10 a. m., Hon. George C. Sadowski, chairman of the subcommittee, presiding.

Mr. SADOWSKI. The committee will come to order.

We have some ladies here who wish to testify. Before we proceed, then, with Mr. Cassidy, we will call on these ladies.

I believe the first witness will be Mrs. Elizabeth Rohr.

Will you state your name and the organization you represent, please?

STATEMENT OF ELIZABETH ROHR, WASHINGTON REPRESENTATIVE OF CONSUMERS UNION OF UNITED STATES CONSUMERS UNION

Mrs. ROHR. I am Elizabeth Rohr, Washington representative of Consumers Union of United States Consumers Union, a nonprofit consumer technical organization with over 100,000 members throughout the United States, is strongly opposed to the Reece bill (H. R. 2390).

This proposed legislation would seriously weaken the present protection consumers have against fraudulent and misleading advertising. The provisions of H. R. 2390 would hamstring the Federal Trade Commission in investigating and correcting the dissemination of false advertising, thus helping unscrupulous advertisers to promote the sale of worthless or dangerous products to consumers. In addition, by reducing penalties for violation of cease-and-desist orders, H. R. 2390 would make it advantageous to manufacturers to defy the provisions of the existing act.

Consumers Union is concerned with preventing passage of any proposals which would make Federal control of misleading advertising less effective. At this time, a flood of new products is being offered to the consuming public.

Unless there is effective regulation of the advertising claims made in connection with their sale, many consumers will be misled into purchasing products detrimental to their health and their pocket-books. The FTC has the administrative machinery and trained personnel to stand guard over the consumer's health and economic welfare through investigating and cracking down on false advertisements.

Every provision of the Reece bill would undermine the protection the consumer now has. To begin with, major obstacles would be set

up against executing the FTC's cease and desist orders. Since a violator would be encouraged to evade the consequences of misleading advertising by engaging in long and complicated litigation under the Reece bill, it would not be the violator but the FTC which would have the burden of proving that its findings were "supported by the preponderance of evidence."

In effect, this would put the FTC on trial rather than the violator, and would enable a disseminator of false advertising to drag out hearings through lengthy legal procedure involving the use of large numbers of experts, technicalities, and so forth.

The courts would be clogged with appeals and the practical result would be a great increase in misleading advertising, since violators would know that the FTC could be tied up with protracted legal hearings. A premium would be placed on violations because only a small minority could ever be punished under the time-consuming procedure established by H. R. 2390.

A second premium is put on violations by the Reece bill in its provision to put a \$10,000 ceiling on penalties imposed on violators and to reduce the maximum penalty for each violation from \$5,000 to \$1,000.

The present penalties are far from adequate for big manufacturers of products whose use is injurious to the health of consumers.

But the amendment proposed in the Reece bill would make penalties a joke to large corporations. A \$10,000 ceiling would be regarded simply as a sort of license charge, small in comparison with the budget for and the profits made from misleading advertising. It would certainly not act as a curb upon large corporations which combine in order to control markets and fix prices to the detriment of the consumer.

In addition to weakening the existing safeguards against fraudulent and misleading advertising, H. R. 2390 would stimulate the sale of drugs and other products which may have serious potential dangers to consumers.

Under the present act, the consuming public must be informed in advertisements of potential hazards existing in the use of certain products, or at least advised to use the product only as directed.

The public is thus warned and can guard itself against dangerous consequences. Were H. R. 2390 to be adopted, it would not be possible to require a company advertising a drug or device that is potentially dangerous to state what might happen if the drug were used under conditions prescribed in the advertisement, or even under customary or usual conditions.

Under the Reece bill, advertisers would only be required "to prevent deception resulting from indirection and ambiguity, as well as from statements which are false."

This amendment would make it impossible for the FTC to require advertisers to disclose to the consuming public consequences which may result from use of products under conditions not disclosed in the advertisements.

Right now the public has become very interested in many new drugs developed during the war. Physicians have warned that indiscriminate use of some of these can lead to dangerous complications. But under H. R. 2390, advertisers could push the sales of such products, without publishing disclosures of their consequences. There is also-

Intely no justification, in our opinion, for removing this protection to consumers, so that some manufacturers can increase their sales and profits at the expense of the health and welfare of hundreds of thousands of consumers.

Perhaps the worst feature of H. R. 2390 is its provision to exempt foods, drugs, devices, and cosmetics from the jurisdiction of the FTC.

We are consumers and not legal experts, so we are not in a position to discuss the alleged conflict in jurisdiction between the Federal Trade Commission and the Food and Drug Administration with regard to improper labeling.

But as consumers, we do know that exempting foods, drugs, cosmetics, and devices from the regulation of the FTC in this respect would weaken the protection consumers require against unfair labeling practices and false or misleading information on labels.

We believe that it is important for the FTC to continue under the present act to have the authority to correct improper labeling as an unfair method of competition in all industries.

Consumers Union wants to emphasize the importance to the public of the FTC's procedure in requiring that dangerous or potentially dangerous products carry in advertising, at least, the precautionary statement: "Caution. Use only as directed," or such pertinent disclosure as is necessary to protect the consumer.

We fail to see how any honest manufacturer can object to this necessary warning. If his product may have dangerous consequences for its users, he will want to have the assurance that the public has been warned.

But the health of consumers should not be endangered by exempting foods, drugs, devices, and cosmetics from the jurisdiction of the FTC on the ground that a jurisdictional tangle may exist between the FTC and the FDA.

We suggest that the answer to this problem of jurisdiction lies in continuance of the close cooperation that we understand exists between the two agencies.

As far as consumers are concerned, we are more than happy to have the double protection against false labeling. There is no reason, if a food or drug product is fraudulently labeled, why both the FTC and FDA should not be available to proceed against the manufacturer in the interests of the consuming public.

What is at stake here is maximum consumer protection. There should be no loopholes for concerns which misbrand, adulterate, or do not reveal in advertising as well as labeling the potential dangers resulting from use of their products.

We believe that we have demonstrated that the provisions of H. R. 2390 would seriously undermine consumer protection against misleading and false advertising, because the sellers could advertise dangerous products without warning, and in the case of cosmetics or drugs sold by mail order, at soda fountains, or similarly dispensed, the only possible warning to the prospective purchaser would be that found in the advertisement.

Adoption of the Reece bill would only serve the interests of a minority of manufacturers, willing to gamble with the health of the public. For some time they have been seeking to make it easier for them to

get away with dishonest claims and to eliminate existing curbs on the sale of dangerous products. We are not alone in this opinion of the forces seeking to weaken consumer protection.

For example, Business Week—a hard-headed business publication—in its March 24, 1945, issue, pointed out that H. R. 2390—

looks like an answer to the prayer of proprietary drug interests, as the bill would satisfy virtually all objections which drug companies have expressed about FTC procedure.

By the same token, we feel that H. R. 2390 would weaken or nullify much of the protection consumers now have under the provisions of the existing act.

The health and welfare of the American people are the primary concern of Congress. When legislation is proposed that would undermine essential safeguards for the people, it is the duty of Congress to reject it. We respectfully urge your committee to vote down H. R. 2390, thus serving notice that the FTC will continue to uncover fraudulent advertising and to protect the over-all interests of the consuming public.

Mr. SADOWSKI. Thank you.

Mr. REECE. May I ask just one question: You and your organization have confidence in the Federal Trade Commission and likewise in the Pure Food and Drug Administration?

Mrs. ROHR. We have, Mr. Reece.

Mr. REECE. In 1935, as I recall, your organization advocated that the interests of the consuming public would be best served by placing full authority to deal with all phases of foods, drugs, and cosmetics in one agency.

Mrs. ROHR. Congressman Reece, I believe you have our organization confused with another organization. We were not in existence in 1935.

Mr. REECE. That was another organization?

Mrs. ROHR. Yes.

Mr. REECE. Then what would be your attitude now if you were to find that power to deal with all phases of this question should be placed either in the Federal Trade Commission or the Food and Drug Administration?

Mrs. ROHR. That is something that we would not express an opinion on, because as I have said, we are not legal experts and have no legal experts in our organization.

We are interested in maximum consumer protection. Whatever way the Congress chooses to give it to us is all right as far as we are concerned. I think that we have it now with the two agencies.

We do not want either one to lose any of their existing powers.

Mr. O'HARA. Mrs. Rohr, when was your organization organized?

Mrs. ROHR. 1936.

Mr. O'HARA. And where is its headquarters?

Mrs. ROHR. New York.

Mr. O'HARA. What address, please?

Mrs. ROHR. 17 Union Square West.

We have a Washington address, 1706 G Street.

Mr. O'HARA. And what is your connection with that organization?

Mrs. ROHR. I am the Washington representative.

Mr. O'HARA. And what is your title?

Mrs. ROHR. Just that—Washington representative.

Mr. O'HARA. I notice from the statement that it was rather technically prepared as to language.

Did you draw this up yourself?

Mrs. ROHR. No, we have people in New York who come down here, and any testimony is generally the product of several people, including some of our technicians and economists.

Mr. O'HARA. You have your own staff of technicians and experts in New York?

Mrs. ROHR. That is correct. We have a testing laboratory there.

Mr. O'HARA. That is all.

Mr. SADOWSKI. Thank you. The next witness is Mrs. Margaret Thompson. Will you state your name and the organization you represent?

STATEMENT OF MARGARET D. THOMPSON, EDITOR, CONSUMER EDUCATION SERVICE, OF THE AMERICAN HOME ECONOMICS ASSOCIATION

Mrs. THOMPSON. I am Mrs. Margaret D. Thompson, of the American Home Economics Association, Mills Building, Seventeenth and Pennsylvania Avenue.

My home address is Kingston, R. I., and I am the editor of Consumer Education Service, published by the American Home Economics Association.

The American Home Economics Association opposes the policy of H. R. 2390, a bill to amend the act creating the Federal Trade Commission, insofar as this bill, if enacted, would weaken the consumer protection provided by the FTC.

The American Home Economics Association has members in every State, in every city, in every college home economics department, and in many business concerns which require professional standards in their staffs dealing with consumer information. Its members are secondary school and college teachers, homemakers, home economists for food administration, social welfare and public-health workers, research workers, and 4-H Club leaders and home-demonstration workers in the Extension Service.

The aim of the association is to further the best interests of the home and family. Accordingly, an important plank in its current program is "support of legislation to increase efficiency in the buying of consumer goods."

It is in the interest of the home and family that any legislation, which your committee recommends, should increase rather than decrease efficiency in the buying of consumer goods.

We believe you will agree with us that weakening the FTC would be a backward step. Moreover, the association's program of legislative support specifically includes "support of programs for consumer protection in such Government agencies as the Federal Trade Commission."

This is simply carrying on with the association's established stand of many years, in favor of the type of consumer protection which has been developed by the Federal Trade Commission. Now, I am not suggesting that the consumer should be "babied" in this protection. It

is a question of enough information so that the consumer can protect himself.

This association's policy regarding legislation over the years has not only been favorable to the type of consumer protection provided by the FTC, but our members have voluntarily cooperated with FTC in the detailed technical work of building up its trade-practice rules.

Like the FTC, this association is heartily in favor of honest business competition and informative advertising. As consumers, and as an association interested in satisfactory living standards, we have long seen the economic and health importance of proper advertising of consumer goods.

For these reasons, we support FTC in opposing unfair and deceptive treatment of the consumer—as for instance when potentially dangerous drugs and cosmetics are advertised without warning disclosure to the user as to possible harmful results.

As consumers, we have listened with the keenest interest, while your subcommittee so carefully weighed and studied the proposal to amend the Federal Trade Commission by H. R. 2390.

Insofar as H. R. 2390 would weaken the existing Federal protection of the consumer, the American Home Economics Association herewith respectfully registers its opposition.

Thank you very much.

Mr. SADOWSKI. Thank you.

Mr. REECE. May I ask you one question: There has been some question raised that dual control is impairing the protection to the public.

In full and adequate authority to deal with all phases of this question—foods, drugs and cosmetics—should be vested in one agency, either of these agencies, would you feel that that would accomplish the purposes that you have in mind? That is, you have confidence in both agencies, I take it?

Mrs. THOMPSON. You mean, sir, that they should be combined in one?

Mr. REECE. That is, if either agency should be given full authority to deal with this question, either the Federal Trade Commission or the Food and Drug Administration, would you have any objection to that?

Mrs. THOMPSON. We think that the situation as it is now is good Federal consumer protection. We would not make a statement as to giving the entire work to either of those agencies.

Mr. REECE. Thank you.

Mr. SADOWSKI. The next witness will be Mrs. Sylvia Wubnig.

STATEMENT OF SYLVIA WUBNIG, REPRESENTING NATIONAL LEAGUE OF WOMEN SHOPPERS

Mrs. WUBNIG. My name is Sylvia Wubnig of the National League of Women Shoppers.

We are an organization whose members are drawn largely from housewives in some eight or nine cities, nine cities actually, in various parts of the United States.

We are profoundly concerned with any attempt to weaken the protection which we as consumers look for from our Government.

Mr. O'HARA. Will you please give the address of your organization?

Mrs. WUBNIG. Our Washington address is 1706 G Street, and our New York address is 1134 Broadway.

Mr. REECE. How is your organization supported?

Mrs. WUBNIG. By membership dues only.

Mr. REECE. How many members have you?

Mrs. WUBNIG. I am sorry. I do not know.

Mr. REECE. Approximately?

Mrs. WUBNIG. I would not know. I am not on that kind of committee. I am on the consumer committee, and I have been interested in consumer interests for the National League of Women Shoppers.

Mr. O'HARA. Well, you have at least one member, because you are here.

Mrs. WUBNIG. Yes. And if I may make a passing comment, I am not an impartial witness either. I am a very partial witness. I do not want my husband or my family or anybody else related to me to suffer.

Mr. O'HARA. We are all partial in that way.

Mrs. WUBNIG. It seems to us that this bill is an attempt of that sort, to weaken consumer protection. It can benefit no one but the few unscrupulous manufacturers and advertisers who may wish to profit by the inability of the people to evaluate advertising claims or to distinguish harmful drugs and devices. It can benefit no one but manufacturers and advertisers and those who have the funds to engage in protracted litigation or to pay the limited penalties set in this bill.

As consumers, as taxpayers, and as common-sense citizens we oppose the provision which thrusts upon the courts the necessity for investigation of finding of facts.

I do not pretend to be a lawyer; I am a housewife. But it seems amply evident in any careful reading of the act that that is what our courts would have to do by requiring the FTC to be supported by the "preponderance of the evidence."

Judicial review is now available for any who may feel that the Commission's cease-and-desist orders are arbitrary or unreasonable. Why then force upon our already overburdened courts work that is competently done by the experienced technical personnel of the FTC?

To do so is an open invitation to evade compliance with the orders of the FTC by litigation, long drawn out and burdensome, and becomes an effective challenge of the purposes for which FTC was created by Congress.

As consumers, we want the FTC as strong as possible to prevent misleading advertisement, to protect us from the consequences of unfair practices and to provide us warning whenever necessary. We want enforcement to be as quick and efficient as possible.

As taxpayers we object to the costly procedures that will inevitably take place by clogging the courts with appeals that would be spun out endlessly in order to evade FTC rulings. And as common-sense citizens we feel that technically equipped agencies should undertake the special technical questions that come up for investigation.

But although the courts under the Reece bill are given greater duties and responsibilities, they are at the same time deprived of effective sanctions against violators.

It seems to me a contradiction that does not make very much sense.

Mr. O'HARA. You do not understand that the Reece bill wipes out the penalties which now exist; do you?

Mrs. WUBNIG. No; I say that it limits the effect of sanctions against violators, because not only is the maximum penalty, as I read in the bill, for each violation reduced from \$5,000 to \$1,000 for violation, but \$10,000 is set as a limit for the total penalty on the representation of a violation.

When we consider the fact that \$10,000 is not unusual for a single radio broadcast sponsored by leading drug and cosmetic manufacturers, it is obvious enough that \$10,000 might be well worth paying for the privilege of further unhampered violation. Once the violator has paid the limit in penalties, what sanction would the courts have to curb further violations?

Controlling markets, fixing prices, misleading advertisement—are those not privileges that are well worth a mere \$10,000, when millions of dollars in profits are in question? And how then can we as consumers be protected?

I have said I am not a lawyer. I am not a chemist. I am not a druggist. I am not a doctor, either. I buy drugs and cosmetics and foods, and I use them, and I provide them for my family, as most of us who are housewives do, as your wife does.

I am a conscientious consumer, probably on the average more conscientious than most consumers, but I do read the label.

But even though I can read the labels, I do not always know what is going on. I can read a whole series of drug analyses. I do not know whether I will die from it or get better, whether my headache will leave me or I will get something worse than a headache.

I read advertisements. But I must be told which drugs and which cosmetics will be harmful to me. I want that warning. And to deny me that precaution is to deny me the minimum protection I think I can demand from my Government.

Section 3 of the Reece bill does just that. Most people buy in response to advertisements only. A great many drugs are sold over counters where there is no opportunity to read labels even if you were willing to and able to read them and understand them.

And, however truthful all the announced facts may be to permit withholding information that is equally pertinent, that is, that in certain circumstances these drugs, cosmetics, and devices are actually harmful, is to endanger the public health.

And whom would such an amendment to the existing act now benefit? Certainly not the public, whose health and well-being would be endangered; and not the honest, thoughtful manufacturing people and advertisers who would want their customers to be warned of any potential dangers in his product.

It can be only those manufacturers and advertisers who hope to amass great profits through the ignorance and innocence of the buying public. I feel sure that Congress is not willing to jeopardize the public interest and good will to the boundless greed of such people.

Section 5 of the Reece bill removes food, drugs, devices, and cosmetics from the regulation of the Federal Trade Commission and thereby denies us the protection against false and misleading labeling practices as an unfair method of competition.

We want the FTC to continue in its authority to require in advertising any warnings or precautions it deems necessary for products that may be harmful or dangerous. It is doubly to our advantage as

consumers of the potential dangers of the product. Together they can deprive the FTC of its jurisdiction over foods, drugs, devices, and cosmetics would be to deprive the consumer of a second line of defense, and to provide to the unscrupulous manufacturer and advertiser a wider and more dangerous margin of latitude.

This bill, then, as we see it, is a serious undermining of the protection that we as consumers feel is vitally important. We are being flooded with advertising claims and products that we cannot possibly analyze or evaluate.

We now have two technically equipped agencies of the Government that can now protect us against false claims and harmful products. We are grateful to Congress for providing such agencies. We sincerely urge this committee to reject this bill.

Its only result would be to damage the public interest and to destroy the safeguards that have already been soundly and honestly established, and can mean profit to no one but the unscrupulous and the greedy.

Mr. REECE. May I ask a question? You think, then, it would be inadvisable for the courts to have the authority to review the decisions of the Federal Trade Commission on food and drug matters?

Mrs. WUBNIG. Congressman Reece, as I have admitted before, I am not a lawyer, and I do not feel myself competent to answer completely, but it seems to me, and I have reason to believe, that the courts now have adequate power to review any decisions of the FTC which may seem reasonable, unreasonable, and arbitrary.

Mr. SADOWSKI. Thank you.

(The following was submitted for the record:)

LEAGUE OF WOMEN SHOPPERS, INC.,

NEW YORK CHAPTER,

New York 10, N. Y., March 19, 1946.

HON. CLARENCE LEA,

Chairman, House Interstate Commerce Committee,

House Office Building, Washington, D. C.

DEAR CONGRESSMAN: We strongly oppose passage of the Reece bill, H. R. 2390, which weakens Federal Trade Commission cease-and-desist ruling; reduces and limits violators penalties; eliminate requirements to warn against dangerous drugs in advertising, and removes established jurisdiction over drugs and cosmetics.

We urge you to use your influence to defeat this legislation.

Sincerely yours,

ALICE RIVKIN,

Mrs. BERNARD PARELHOFF,

Acting President.

STATEMENT OF IRVING RICHTER, NATIONAL LEGISLATIVE REPRESENTATIVE, UNITED AUTOMOBILE WORKERS, CIO

The UAW-CIO, made up of 900,000 members, strongly opposes Reece bill, H. R. 2390, which would weaken the present inadequate protection against fraudulent and misleading advertising by further limitations on the Federal Trade Commission. The bill appears designed to put the Federal Trade Commission on trial rather than the alleged violators, by providing cumbersome legal machinery. Instead of increasing penalties for violations, the Reece bill reduces maximum penalties. This would encourage further frauds by the drug manufacturing industry, which has shown its disregard for the public interest on many different occasions. The proposed maximum penalty of \$10,000 on violators is an invitation to violations.

The bill also absolves manufacturers and advertisers from telling consumers the consequences of indiscriminate use of drugs.

We believe passage of this bill would betray the general public for the greater profits of a few manufacturers who don't like the present legal limits on their exploitation of the public.

Mr. SADOWSKI. I think we can proceed with Mr. Cassedy, our next witness.

**FURTHER STATEMENT OF JAMES W. CASSEDY, SPECIAL ATTORNEY,
FEDERAL TRADE COMMISSION**

Mr. CASSEDY. Mr. Chairman, I do not think I will take very long.

I appreciate the fact that I have taken possibly too long already. So I will try to get through as quickly as I can.

Mr. REECE. Did I understand you to say, Mr. Cassedy, that you came with the Commission in 1939?

Mr. CASSEDY. No, sir; I said I came March 9, 1943.

Mr. REECE. You have been with the Commission 3 years? That was what I wanted to get cleared up. I was not sure as to my recollection.

Mr. CASSEDY. Mr. Chairman, in the letter of Hon. Paul V. McNutt of May 3—

Mr. REECE. Before you go into another phase of the question, Mr. Chairman, may I again refer back to the Dearborn case, which I admit is becoming somewhat shopworn, but for the purpose of keeping the record straight in connection with the time that this case was instituted, since it involved either the good judgment or the propriety of one of the witnesses who referred to it in the first instance.

Mr. CASSEDY. I would like to correct a statement I made if I may.

Mr. REECE. That was what I was getting around to.

Mr. CASSEDY. All right. I appreciate your suggestion.

Mr. REECE. If I may add first: Now, in checking back further on it, it is my understanding that a stipulation was drawn up in this case in 1937.

Then the complaint was served on September 17, 1938, which was after the Wheeler-Lea Act was passed, some 6 months afterward. That is what I understand the facts to be.

Mr. CASSEDY. I do not know what you have in mind, Congressman Reece, about this case. As I stated before, this case is based upon section 5, on unfair methods of competition, and is not based on the Wheeler-Lea amendments at all.

Now, the investigations in this case were begun long prior to the enactment of the Wheeler-Lea amendments.

I believe they were enacted March 21, 1938. I think that is the effective date of those amendments. The complaint in the Dearborn case was issued September 17, 1938, and I have in my hand a copy of the complaint and a copy of the order.

Mr. REECE. But the stipulation was signed prior to the enactment of the Wheeler-Lea amendments, and then things went along; and then after the Wheeler-Lea amendment was passed, which, of course, gave the Federal Trade Commission additional authority, a complaint was served in the Dearborn case.

Mr. CASSEDY. I beg to differ with you. I do not see that the Wheeler-Lea amendments have anything to do with the Dearborn case.

Mr. REECE. Well, I infer from your statement that all of your proceedings are under section 5, and that you exercise very little authority under the Wheeler-Lea amendments.

Mr. CASSEDY. I can point out to you that the cases referred to dealing with labeling, as an unfair method of competition, are under section 5.

Now, when we follow the policy that you have criticized under section 15 (a), relating to the advertisements failing to disclose the consequences of use of the products, you are under the Wheeler-Lea amendments. But the two types of cases are entirely different.

Mr. REECE. In an earlier phase of your statement, you referred to the proprietary association, I think, as having favored the Wheeler-Lea amendment back in 1938, giving the Federal Trade Commission this authority which it is now exercising.

I thought it might be well to clarify the record in that respect. In going back over the hearings, I find that while the association did oppose the original Tugwell bill, so to speak, which was introduced in 1933, in 1935, when Mr. Hoge appeared for the association and various other clients before the Chapman subcommittee, of which I happened to be a member, he made reference to the fact that the association did oppose the original Tugwell bill.

Mr. Chapman made the statement:

Just at that point, for my own part I am frank to say that I was very much opposed to it, and this committee in fact never did conduct any hearings on it.

Then Mr. Hoge stated—and this was on August the 10th 1935—

We do not oppose the bill here today, and we do not propose any amendments.

That is the Chapman bill, which gave all jurisdiction over food, drugs, and cosmetics to the Food and Drug Administration and removed the jurisdiction over advertising to the Pure Food and Drug Administration.

So far as I have been able to ascertain, that was the last statement made for the proprietary association. I am just putting that in the record to clarify it in that respect.

Because one would draw the inference from what you said that the association was one of the sponsors of the Wheeler-Lea amendment.

There is no record that they opposed the Wheeler-Lea amendment, but that is the statement that was made with reference to the Chapman bill which placed complete control including advertising, in the Food and Drug Administration. I might also say that while I was interested in the subject at that time, the chief proponent of the proposal, the ones with whom I advised with more closely with reference to the proposal, that the Federal Trade Commission control over advertising of food, drugs, and cosmetics, was the Commission itself, which was quite proper.

Mr. CASSEDY. Mr. Reece, I wish to point out that those statements you referred to were made by Mr. Montague. I did not make those statements about the proprietary association.

Mr. REECE. If I am in error on that, I am sorry, but I thought when you were speaking of Mr. Hoge that you made some reference.

Mr. CASSEDY. I did refer to their connection with the Commission's policy under section 15 (a), but not with reference to the enactment of the law.

In the letter of Hon. Paul V. McNutt of May 3, 1945, while he was Federal Security Administrator in charge of the Food and Drug Administration, written to Congressman Clarence F. Lea, the chairman of this committee, Mr. McNutt states with respect to the proposed amendment of section 15 (a) :

Section 3 of the bill would amend the definition of false advertisement in section 15 (a) of the Federal Trade Commission Act. The amendment would change a provision of the act which is identical in its import with a provision of section 201 (n) of the Food, Drug, and Cosmetic Act. It would repeal the mandate of the present law to the administrative agency and to the courts to take into account, in determining whether representations for an article are misleading, failure to reveal facts material with respect to the consequences which may result from the use of the article under the conditions prescribed in those representations, or under such conditions as are customary or usual. In deleting this mandate, we think the conclusion is inescapable that the standard of truthfulness set up by the statute is lowered. While the amended language could perhaps be construed as broadly as the original provision, it is by no means apparent how the courts could do so in the light of the legislative history created by Mr. Reece's declared purpose in making the change.

We are gravely concerned that the adoption of this amendment will furnish a persuasive basis for a similar amendment to section 201 (n) of the Food, Drug, and Cosmetic Act. This would unquestionably impair the effectiveness of the act in controlling misrepresentations that result in harm to health.

Section 4 of the bill would include the Food, Drug, and Cosmetic Act definition of labeling in section 15 of the Federal Trade Commission Act which lists definitions "for the purposes of sections 12, 13 and 13 * * *." Because of its limitation to these sections, we do not see that it would have any practical effect on the relationship between activities in the enforcement of the two laws since, so far as we are aware, the Federal Trade Commission's proceedings against labeling have not been under sections 12, 13 and 14 but under section 5. (See *Fresh Grown Preserve Corporation v. Federal Trade Commission* (125 Fed. (2d) 917, 919).)

Dr. P. B. Dunbar, Commissioner of Food and Drugs, in his letter dated July 13, 1945, to Congressman Reece regarding the Reece bill, makes an argument that there should be no division of responsibility in the control of adulteration, misbranding and false advertising of food, drugs and cosmetics, and that the agency best qualified to administer the law should be charged with its enforcement. Dr. Dunbar states:

I am not urging that regulatory control of these commodities be combined under any particular agency.

But his argument stresses his view that the Food and Drug Administration is much better qualified than the Federal Trade Commission to administer and enforce the law regulating false advertising as well as adulteration and misbranding of food, drugs and cosmetics. In support of his argument, Dr. Dunbar refers to several cases which will be hereinafter discussed.

These cases are : *Federal Trade Commission v. Willard Tablet Company, Inc.* (Docket 3100, 27 F. T. C. 1076) ; *Federal Trade Commission v. Capon Water Company et al.* (Docket 2736, 26 F. T. C. 423) ; *Federal Trade Commission v. W. Gordon Pervis* (Docket 2540, 23 F. T. C. 1096) ; *Federal Trade Commission v. Sekov Corporation.* (Docket 4061, 31 F. T. C. 898) ; *Federal Trade Commission v. The Carlay Company and Carl A. Futter* (Ays Candy), (Docket 4898) ; *Federal Trade Commission v. Carter's Products, Inc.*, (Docket 4970), in which trial is incomplete.

Each of the above cases were proceedings by the Federal Trade Commission against false advertising, in the first three as an unfair method of competition and in the others as an unfair or deceptive act or practice. None of these cases involved false labeling or misbranding. It will be noted that Dr. Dunbar does not refer to a single case wherein a Federal Trade Commission proceeding against false labeling of food, drugs, devices or cosmetics as an unfair method of competition interfered in any way with the jurisdiction of the Food and Drug Administration over false labeling.

It should also be noted that Dr. Dunbar does not point out a single instance where an action of the Federal Trade Commission requiring an advertiser to reveal facts and consequences in advertisements, or at his option in labels, interfered in any way with the Food and Drug Administration.

In the case of *Federal Trade Commission v. Fresh Grown Preserve Corporation* (125 F. (2d) 917 (C. C. A. 2, 1942)), the complaint was based upon false labeling as an unfair method of competition, but it was not issued until after the failure of the Food and Drug Administration in its case *United States v. Fresh Grown Preserve Corporation* in the District Court for the Eastern District of New York on May 17, 1938. The Commission's order to cease and desist was upheld by the circuit court of appeals.

And I wish to add to that statement that that case was instituted, so I am informed, at the specific request of the Food and Drug Administration, and with their full cooperation.

They furnished, I believe, some analyses of the product involved, which was analyzed in their laboratory.

In the case of *Federal Trade Commission v. Capon Water Company*, the complaint, which was based upon false advertising as an unfair method of competition, and did not involve false labeling, was not issued until after the failure of the Food and Drug Administration in its case, *United States v. Ninety-Four Dozen, More or Less, Half Gallon Bottles Capon Springs Water* (48 F. (2d) 378) (District Court for the Eastern District of Pennsylvania), which was dismissed upon appeal (3 Cir., 51 F. (2d) 913).

That is one of those condemnation proceedings, as we call them.

Mr. O'HARA. Libel proceedings are proceedings—

Mr. CASSEDY. Where the property is seized because of some false labeling in violation of the food and drug law.

The Commission's order to cease and desist was upheld by the circuit court of appeals (107 F. (2d) 516 (C. C. A. 3, 1939)).

That case was also instituted at the request of the Food and Drug Administration, which is indicated in this letter that I have in my hand from the Food and Drug Administration, that was written by Dr. F. J. Cullen, who at that time was Chief of the Drug Control of the Food and Drug Administration.

Mr. O'HARA. Mr. Cassedy, would you give us the date of the letter, please?

Mr. CASSEDY. The date of the letter is March 8, 1932. That is the date stamped on the letter. The date received by the Federal Trade Commission, is March 9, 1932.

I will read it. It is addressed to the Federal Trade Commission in Washington, D. C.

UNITED STATES DEPARTMENT OF AGRICULTURE,
FOOD AND DRUG ADMINISTRATION,
Washington, D. C., March 8, 1932.

FEDERAL TRADE COMMISSION,
Washington, D. C.

(Attention of Mr. E. J. Adams.)

GENTLEMEN: We are submitting photostat copies of the labels for Capon Mineral Water which are used in the District of Columbia, also those used on their interstate shipments, also a large leaflet entitled "Analysis Capon Mineral Water and Clinical Reports," and a photostat of a circular letter dated February 4, 1932.

This water has been the subject of consideration by the Department on several different occasions. The original labels recommend it as a cure for rheumatism, gout, syphilitic rheumatism, chronic inflammations, diabetes, kidney trouble, etc. Several revisions have been made but the one now in use is not entirely satisfactory because of its references to "health" and "restoring the normal activity of the kidneys and bowels."

Mr. REECE. Do you know where a person could get a bottle of that?

Mr. CASSEDY. If it could do all of that, it might be a good thing to have a bottle. It is not necessary to read the whole letter. I merely point out that that letter was sent to the Federal Trade Commission, and as a result, the Federal Trade Commission proceeded against that concern. That was not a label case.

Mr. REECE. That was while he was with the Food and Drug Administration?

Mr. CASSEDY. Yes, sir.

Mr. REECE. And of course that letter was written before the Food and Drug Act was passed?

Mr. CASSEDY. Before the act of 1938 was passed.

Mr. REECE. And before that, the Pure Food and Drug Administration had very inadequate authority; that is, the Copeland-Chaplin bill gave greatly extended authority to the Pure Food and Drug Administration for protecting the public, did it not?

Mr. CASSEDY. I think the act of 1938 extended the authority that the Food and Drug Administration had, especially in the enactment of 201 (n), which gave them the right to require the labels to reveal the consequences of use of the product.

Mr. REECE. That was a new bill, however, which greatly extended the scope and authority of the Federal Trade Commission. I do not think you need to be too reserved in expressing your view on that.

That was widely recognized by all authorities and all informed people; and if you are not informed as to that effect, it greatly impairs your effectiveness as a witness.

Mr. SADOWSKI. I think Judge Davis can answer that.

Mr. DAVIS. Mr. Chairman, I think Congressman Reece overlooked the fact that Mr. Cassedy is replying to the letter to Congressman Reece from Mr. Dunbar, in which Dr. Dunbar specified this particular case as an indication of conflict between the two agencies. And he is just calling attention to the fact that after they had lost the case they asked the Federal Trade Commission—

Mr. REECE. But my dear Judge, the letter to which he refers was written back when the Pure Food and Drug Administration was proceeding under the old Wylie bill, which was wholly incomparable with the 1938 act insofar as vesting the Pure Food and Drug Admin-

istration with authority to adequately control pure food, drugs, and cosmetics is concerned.

Mr. DAVIS. But why does Dr. Dunbar try to make a point out of it then? He does. He is simply answering the letter.

Mr. REECE. Dr. Dunbar was bringing it up to date, and not dealing with history so ancient as that with which Mr. Cassedy dealt.

When the witness goes back and discusses the lack of authority which the Pure Food and Drug Administration had to deal with these things prior to the enactment of the 1938 law, it, to say the least, is not in point.

Mr. DAVIS. Dr. Dunbar specifies four cases of conflict between the Federal Trade Commission and the Food and Drug Administration, and Mr. Cassedy is showing you that there was not any conflict on any one of them; that these two cases just mentioned were instituted by the Commission at the request of the Food and Drug Administration after they had lost them.

Mr. REECE. And does Dr. Dunbar's letter, Judge, in reference to this case or these cases to which Mr. Cassedy is now devoting himself, deal only with the phases of those cases that obtained prior to the enactment of the 1938 act; or to certain phases that existed after the 1938 act was passed?

Mr. DAVIS. My opinion is that the impression could be obtained from his letter, since 1938. But, as Mr. Cassedy will show, none of them were instituted after that act except the Fresh Grown Preserve Corp. case, and it was already explained that after they had lost that case they asked the Federal Trade Commission to proceed and furnished us what material they had, and cooperated with the attorneys of the Commission in prosecuting the case.

The Commission won the case, and the court of appeals said they had the authority to do it. That is the only case since the passage of the Wheeler-Lea amendment to the act in which the Commission has instituted proceedings on the question of label.

Just as I was going to explain, as a matter of policy, to avoid any confusion or anything of the kind between the two agencies we decided upon a policy of not dealing with cases that involved nothing except labels.

Mr. REECE. Dr. Cullen's letter, written from the Pure Food and Drug Administration, calling the attention of the Federal Trade Commission to this matter, was dated March 8, 1932, and it would appear from Dr. Dunbar's letter, that it was in January 1938 that the cease and desist order was issued.

Do you mean to say that it took the Commission 6 years to reach a point in the proceedings where a cease-and-desist order was issued in this case, after the Food and Drug called the attention of the Commission to it? If so, that would indicate rather desultory action by the Commission.

Mr. DAVIS. I do not know the history of that, but I know there were all the delays on earth; and at any rate, it has absolutely nothing to do with the Wheeler-Lea Act.

Mr. O'HARA. Might I ask one question there, Mr. Cassedy? In how many instances have the Food and Drug requested prosecution by the Federal Trade Commission?

Mr. CASSEDY. I am informed of two, one the Fresh Grown Preserve Corp., and the other this Capon Water Co. that I have just mentioned.

I am certain that there are others. However, I have made no independent investigation. I looked these up because I knew these cases would be discussed. But as to how many others, I am sure it is done all the time.

We refer cases to them and they refer cases to us.

Mr. O'HARA. I would like for you to testify as accurately as you can on the point.

Mr. CASSEDY. Well, I can say that it is their policy to refer to the Commission any cases that involve false advertising, as well as our policy to refer to them cases that involve false labeling. We both follow that policy and have been doing it for years.

Mr. O'Hara, there are very, very cases of this Commission that involved false labeling, even with advertising, as Judge Davis has pointed out, since the Wheeler-Lea amendments, because it has been the policy of this Commission not to deal with these cases but to refer them to the Food and Drug Administration.

This Commission merely finished up a few cases that were in progress at the time of the enactment of the Wheeler-Lea amendments.

Mr. O'HARA. Now, I presume it is perfectly natural that a case that is called to the attention of the Food and Drug Administration which involves the question of false advertising would automatically be referred by them to your office. Is that not true, Mr. Cassedy?

Mr. CASSEDY. Yes, sir, and I am sure they would do so.

Mr. O'HARA. And the alternative is true: Where you run into a case of this kind, you would refer that false labeling to the Food and Drug?

Mr. CASSEDY. Yes, sir; we do that all the time.

Mr. DAVIS. Mr. O'Hara, I have here to refer to the Commission over 60 letters, carbon copies of letters of labeling cases which the Commission has referred to the Food and Drug Administration since sometime in 1944, when we commenced keeping separate files.

In addition to that, I think there are 17 letters where they simply told the applicant to take that up with the Food and Drug Administration.

I have those here and was going to show them. That is the uniform policy.

Mr. O'HARA. Judge, what my last question to Mr. Cassedy related to, and what I would assume from what the testimony here is that that would be the natural flow of practice between the two groups.

I just assumed that, and I hope I stated it fairly.

Mr. DAVIS. This policy that I am speaking of as to the Commission has obtained from the beginning, and they frequently refer complaints to us about advertisers.

I have no way of knowing, of course, whether they refer all those complaints, but I have reason to believe that they do, because we have received a great many of them, and receive them right along.

I do know that it has been our policy to send them all labeling cases, not withstanding the fact that both before and since the passage of the Wheeler-Lea Act the court has held specifically that we had always had and now have jurisdiction over labeling. But in order to proceed harmoniously and without any conflict, the Commission adopted that

policy and has agreed to it, and I want to say that I just cannot understand anybody, Dr. Dunbar or anybody else, suggesting any lack of harmony between the two agencies.

We have them to make laboratory tests for us all the time, and pay them for it. In other words, a good many advertisers will not furnish the contents of their products.

Mr. REECE. But Judge, Dr. Dunbar, as I read his letter, does not suggest any lack of harmony. It goes purely to the question of the law, which gives certain dual authority over these subjects to different agencies.

So I would not put Dr. Dunbar in the position where he is saying that there is any lack of cooperation.

Mr. DAVIS. I know. I did not say that. But he did say, if I understood, that there were instances of alleged conflict.

Mr. REECE. Oh, yes; conflict in authority, but not in personalities.

Mr. DAVIS. Oh, I know. Of course not. I did not understand that. Our personal relations have been perfectly harmonious, and we are dealing with them all the time.

Now, on the question of dual jurisdiction, the Federal Trade Commission and the Department of Justice have dual jurisdiction, you might say, given by Congress over various sections of the Clayton Act.

We also have the same over violations of the Sherman Act. But I want to tell you, gentlemen, there is plenty of work for both of us, and then it cannot always be done. The same is true with regard to the Federal Trade Commission and the Food and Drug Administration.

We both have more than we can do, unless we are given a great deal more funds and a great deal more personnel to enforce the law.

Mr. REECE. Now, as I understand, Dr. Dunbar in referring to this case, in effect is dealing with the question of conflict in jurisdiction, which involves the question of *res adjudicata*, the net result of which is the impairment of consumer protection.

Mr. CASSEDY. Will you permit me to answer that?

Mr. REECE. It is true that the complaint was filed prior to the enactment of the Wheeler-Lea Act. But it then went on to court, and Judge Dunbar quotes from what the court said.

Mr. SADOWSKI. What case is that?

Mr. REECE. The Capon case. He quotes at some length. But the court made this statement, referring to the ineffectiveness of the decision of the Commission to protect the public:

Because if these so-called mineral waters are not of any independent therapeutic value, the public should be protected against assertions otherwise.

Then it says:

The Commission's order is surely the most gentle exercise of its power extant.

Then it says further:

Although this may be our feeling about the order we are affirming, there does not seem to be anything we can do about it.

Then, as Dr. Dunbar says, the respondents thereafter submitted a report to the Commission which contained a sample of the advertising.

Then, in June of 1943, in an effort to protect the public from this product, the Pure Food and Drug Administration started action and made a seizure.

That action was challenged on the basis that the matter had already been adjudicated. I believe the Pure Food and Drug Administration appealed from that decision, but I do not think his reference to this case is out of point since he is dealing with the question of res adjudicata which is involved here and the fact that the case was referred to the Commission prior to the enactment of the Wheeler-Lea Act has nothing to do with it.

He has recited his facts going back to a date prior to the enactment of the Wheeler-Lea Act, it is true, but he brings it up to date and shows how this dual jurisdiction has the result of preventing or making it more difficult for the Pure Food and Drug Administration to protect the consuming public.

So far as I am concerned, I cannot see how his citing this case is out of point.

Mr. CASSEDY. I can show you, if you let me talk.

Mr. SADOWSKI. You may proceed, Mr. Cassedy.

Mr. CASSEDY. The only conflict of jurisdiction, if in fact it is a conflict, between the Federal Trade Commission and the Food and Drug Administration arises from an application of the doctrine of res adjudicata. This has occurred in the cases of *George H. Lee Company v. Federal Trade Commission* (113 F. (2d) 583 (C. C. A. 8, 1940), 27 F. T. C. 314), *United States v. Willard Tablet Company* (141 F. (2d) 141 (C. C. A. 7, 1944)), and *United States v. Capon Springs Water*, decided by the District Court for the Southern District of New York in February 1945, and which is pending on appeal in the second circuit court of appeals.

In the *Lee case*, supra, the failure of the Food and Drug Administration to establish the falsity of the statements in the labeling acts as a bar to an action by the Federal Trade Commission to forbid the use of substantially similar statements in advertising.

In the *Willard Tablet* and *Capon Springs Water cases*, the proceedings of the Federal Trade Commission, according to Dr. Dunbar, in approving certain advertising representations, acted as a bar to the Food and Drug Administration proceeding against false labeling that contained substantially similar representations.

It appears that both the *Willard Tablet* and *Capon Springs Water cases* were determined upon an erroneous assumption that the filing of reports of compliance in the Federal Trade Commission proceedings constituted an approval by the Commission of the statements made therein.

To explain that a little bit, after an order is issued by the Commission, as was issued in the *Capon Water case* and in the *Willard Tablet case*, the Commission procedure, and the rules, require the filing within a certain length of time—I believe 60 days—of a report of compliance.

That is 30 days in some instances, I recall. The filing of that report of compliance by the respondent in such cases may include the advertisements or the representations that they use or intend to use in their future advertisements.

Now, the Commission received the reports of compliance in those two cases. There was no approval by the Commission in either of those two cases of the representations that the respondents said they intended to use in the future.

When the Food and Drug Administration proceeded in its cases against these same respondents, the United States Attorney handling

those cases erroneously assumed, according to Dr. Dunbar in the Capon Water case, and according to the decision itself in the Willard Tablet case, that the Federal Trade Commission had approved those representations contained in the reports of compliance.

That was an erroneous assumption, but on that assumption the United States attorney stipulated that to be the fact in both cases. Based on that stipulation, the courts held that the approval of the representations by the Federal Trade Commission would act as a bar under the doctrine of res adjudicata to the proceedings by the Food and Drug Administration against the same representations in labeling.

So I say to this committee that those two cases are not sound; that the doctrine of res adjudicata should not have applied in those cases.

Mr. REECE. But, whatever the circumstances is, the courts have held that a Commission order was res adjudicata in a libel proceeding, so as to preclude the Food and Drug Administration from proceeding against a product, of which the Willard case is a sample; and then also the courts, whatever the circumstances, have held that a judgment in a libel proceeding brought by the Food and Drug Administration is res adjudicata in a Commission case involving the same product and the same claims, which is illustrated by the George H. Lee Co. case.

Mr. CASSEDY. Yes, sir; it works both ways.

Mr. REECE. And the courts have so held.

Mr. CASSEDY. Yes, sir; the courts have so held, in the Willard Tablet and Capon Water cases, and the George H. Lee cases; the three cases in which that doctrine has applied.

The George H. Lee case applied to a decision of the Food and Drug and the other two applied to decisions of the Federal Trade Commission.

Mr. O'HARA. Mr. Cassedy, is that not a principle to which you agree on the res adjudicata case principle? Here is a conflict of jurisdiction between two departments of the Government. It is not any more than simple justice that after one department gets through prosecuting it ought to cover the offense.

Mr. CASSEDY. Let me read my explanation of that, sir, in the statement that I have.

However, regardless of the soundness of the application of the doctrine of res adjudicata in these cases, these situations do not arise except where the decision of the Commission in its proceedings or the court in Food and Drug proceedings, is favorable to the respondent or claimant.

If the false representation in the advertising or labeling is conclusively established in the Commission proceedings, such proceedings would not bar subsequent action by the Food and Drug Administration in its proceedings against the same product and upon the same false statements.

Likewise, if the false statements in the labeling are conclusively established by the Food and Drug Administration proceeding, such proceeding would not bar subsequent action by the Commission against the same false representations in advertising and in labeling as an unfair method of competition.

The fact that more than one proceeding may be had against the same respondent and same product should not be considered as an objection.

Consumer protection should be the only consideration in such cases, and if the representations are in fact false, the Federal Trade Commission and the Food and Drug Administration are fully justified in taking as many actions to forbid such practice as are authorized by law to stop the law violations.

The Food and Drug Administration has in fact instituted many successive actions against the same product based upon the same false labeling and involving the same manufacturer.

Dr. Dunbar refers to four seizures of Ayds Candy in 1940 and 1941. That is referred to in the letter that he wrote this committee.

The Carley Co. was the manufacturer. The same false labeling was involved in each case.

Mr. O'HARA. Mr. Cassedy, no one disagrees with the necessity of consumer protection. Naturally, we are all as much concerned with that as you are.

Now, the point that appears to me to be important in this matter is whether there is a dual jurisdiction of the Federal Trade Commission and the Food and Drug Administration. If a proceeding is brought by one, obviously the purpose there is the same as that of the other as to consumer protection, is that not so? That is the ultimate aim of both of them.

Mr. CASSEDY. Yes, sir.

Mr. O'HARA. Unless there is a vicious propensity on the part of the manufacturer to disregard, why should there be a continuation of a harassing action by the other when it covers the same purpose and for the same effect?

Mr. CASSEDY. That would necessarily follow when the Food and Drug has jurisdiction over labeling and the Federal Trade Commission has jurisdiction over advertising.

Mr. O'HARA. It all reaches the same end, does it not? Consumer protection or the public welfare?

Mr. CASSEDY. Yes, sir; it does. But let me point this out to you: If you had the jurisdiction or the authority all in one agency, as I have written in my statement, you would still be met with the doctrine of *res adjudicata*.

Mr. O'HARA. That is, you would, as I understand the law to be, in the event there is an acquittal.

Mr. CASSEDY. Yes, sir, where a decision would be favorable to the advertiser, the manufacturer.

Mr. O'HARA. Now, if there is not, then the door is wide open.

Mr. CASSEDY. For successive actions; that is correct.

Mr. DAVIS. Right in that connection, Congressman O'Hara, these decisions in question do not base the *res adjudicata* upon the Federal Trade Commission's action or the Food and Drug Administration, but the Government. They say that if the Government proceeds against citizens and it lost in the suit, and then a subsequent action is instituted by the Government, it applies to the Government, whether it is this agency or that agency, or the Department of Justice.

Now, if the same agency is cast in an action and then it institutes a subsequent action against the same party for the same alleged offenses, the doctrine of *res adjudicata* would apply to them just the same as if the first action had been by another agency.

Mr. O'HARA. I understand that, sir.

Mr. DAVIS. That applies to the Federal Trade Commission, and it applies to the Food and Drug Administration, so that the doctrine of *res adjudicata* would apply just the same whether all of this authority was under the Food and Drug or under the Federal Trade Commission.

Now, here is another thing: Out of the thousands and thousands of cases that have been handled by the Food and Drug Administration and by the Federal Trade Commission during the years, they can only fish out four in which action by one has been successfully plead as *res adjudicata*.

Mr. CASSEDY. Only three cases, Judge.

Mr. DAVIS. Only three cases out of thousands and thousands.

Mr. O'HARA. The question in my mind that I was trying to decide was what would be the policy of your Commission in an identical labeling case involving also advertising, if the circumstances were the same, and the Food and Drug prosecuted? Why should you follow it up with a prosecution on the false advertising? I would like to know the reason why.

Mr. DAVIS. Well, the Food and Drug Administration, we will say, are involved in a proceeding for false labeling. We will say that they stop that false labeling. But they still advertise the same things that they had on the label and which were stopped.

Mr. O'HARA. You mean that is a condition which continues after the Food and Drug would prosecute?

Mr. DAVIS. Yes; absolutely.

Mr. O'HARA. I can recognize the distinction there.

Mr. DAVIS. Now, our statute says that we are authorized and directed to prevent unfair methods of competition—unfair and deceptive acts and practices. One of those unfair practices is false advertising.

Mr. SADOWSKI. I think that is absolutely right. That is the correct procedure.

Mr. DAVIS. In other words, for the protection of the public if the procedure before the Food and Drug does not stop them from all the violations, and simply stopped false labeling, but permitted engaging in false advertising subsequent to that, I think the suggestion of Mr. Cassidy is correct: That we should continue until we stop them from those practices if we can.

Mr. O'HARA. Well, Judge, I do not differ with your statement on that at all. But from what I understood as to some of the complaints where the same principles was involved, there seems to be a sort of race for jurisdiction over the subject, as it seems to me.

I think that is unfortunate because we are all interested in consumer protection in the whole situation. I was trying to get at your attitude as a matter of policy.

Mr. DAVIS. I will tell you, Congressman, that we try very hard to avoid any conflict; we do not like to start after the same rabbit somebody else already has jumped. That is particularly true with the Department of Justice.

In other words, if they have instituted an investigation of a violation over which we also have jurisdiction, we always inquire before we start on anything of that kind, and if they are doing it, we stay off.

We do the same with the Food and Drug Administration and with the Post Office Department, which, as you know, has jurisdiction over fraudulent use of the mails.

Frequently complaints are made to us at the same time. An applicant may complain about the unfair practices of his competitors. Sometimes he will write to the Post Office Department and the Food and Drug Department and Federal Trade Commission.

None of us knows that he has written the other. Sometimes actions may be instituted by both. Well, we always try to let them try it out, especially if they are the first to institute the action. We do not quibble over a question of a little time either. We try to avoid those things.

We have plenty to do without duplicating our efforts with any other agency of the Government. And I tell you in all good faith, we do everything we can to avoid that, because we think it is only fair.

Now, in that connection, after the Federal Trade had instituted a very important action, that of the Cement Association, et al., which was tried with a large volume of testimony, the Commission issued a cease-and-desist order, and the other side, the respondents, appealed to the circuit court of appeals.

Since that appeal was taken, 27 different motions were filed. When it was set for a final hearing, very much to our surprise, the Department of Justice filed a similar complaint in the district court, the Federal District Court of Colorado.

Well, we were astonished when we heard what was taking place. Then the respondents in the case we were trying filed a petition setting forth that as a bar to the action out there.

Well, the chief counsel and I and one or two other members went over and talked with the Attorney General, the present Attorney General, who had just recently become the Attorney General and who was wholly unfamiliar with the details.

He called in those responsible for that other case and heard their version of it and said that he thought it should not have been brought. To make a long story short, that case was squelched right there just as soon as he got knowledge of the situation.

Now, I simply mention that to tell you that sometimes those things happen without the higher-ups knowing about it.

Mr. O'HARA. Of course, Judge, they do not all turn out as judicially as that case did, I understand. They do not all admit that, after all, one prosecution is enough.

Somebody likes to hang on sometimes.

Mr. DAVIS. That is true when they are still engaging in the practices involved in that suit, and they have undertaken, even according to the statement of the court, to delay it in various ways with all those petitions and motions, and so forth, which they have filed and which have been overruled.

But I tell you that we all have our problems in the executive branch of the Government. We have plenty to do. The Federal Trade Commission is certainly doing all it can to avoid any conflict with any other department, and we do not think we have any.

If so, it is a most isolated instance, such as those referred to here, which were really not conflicts.

Mr. SADOWSKI. Thank you, Judge. You may proceed, Mr. Cassedy. We hope we may have your statement concluded this morning.

Mr. CASSEDY. It will be concluded in a few minutes, sir.

Section 5 of the Reece bill, if enacted by Congress, would have the effect of depriving the Federal Trade Commission of its jurisdiction over false labeling as an unfair method of competition, but neither

this section nor any other section of the Reece bill would prevent the application of the doctrine of res adjudicata as a bar to Federal Trade Commission proceedings when the Food and Drug Administration proceeding results favorably to the respondent involved or as a bar to the Food and Drug Administration proceedings when the Federal Trade Commission action against false advertising results favorably to the respondent involved.

Dr. Dunbar has suggested as a solution, in substance, that the jurisdiction over both advertising and labeling of food, drugs, devices and cosmetics should be vested in a single agency. If this were done, the doctrine of res adjudicata would still apply in those cases where the action of the single agency resulted favorably to the respondent involved as a bar to any successive action by the single agency against the same respondent and upon the same false statements.

And to support that, in the case of *George H. Lee Company v. Federal Trade Commission* (113 F. (2d) 583 (C. C. A. 8, 1940)) in regard to this question, the court stated :

The United States may not relitigate the same issue in successive libel proceedings involving different quantities of the same product (*George H. Lee Co. v. United States* (9 Cir., 41 F. (2d) 460)), nor may it relitigate the same issue in any proceeding in which the parties are the same and the product is the same. The rule is "that a right, question, or fact distinctly put in issue, and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and, even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified."

Now, I want to point out that the circuit courts of appeals have decided the Willard Tablet and the George H. Lee cases, but the Supreme Court has not passed on this question.

What the Supreme Court may decide, I do not know. Congressman O'Hara, that may somewhat answer your question. There is considerable difference of opinion as to whether the decisions in these cases are sound. I have the decisions of the circuit courts of appeals in these cases.

The other case is not yet decided. I will file these with the committee, if you so desire.

Mr. REECE. Mr. Chairman, yesterday, in referring to the so-called bromide and acetanilid cases, I made reference to labels or cautions which had been approved by the Food and Drug Administration.

What I had in mind at the time were warnings that had been suggested by the Food and Drug Administration, having in mind, of course, that the Food and Drug Administration never, or at least I so understand, approves a label.

But I want to ask you if this is a correct statement of those cases; taking, for instance, the Bromo Seltzer case, the Emerson case: That the Food and Drug Administration in December 1939 issued suggested warning for the bromide, acetanilid, and other products of that type.

Then in January there were seizures by the Food and Drug Administration of various headache remedies which included the products of the Emerson Co. The Emerson Co. filed an answer, and indicated its intention to contest the action of the Food and Drug Administration, moving to have the case transferred to the Baltimore jurisdiction from the New York jurisdiction, where the proceeding was instituted.

The removal was refused, and a short while prior to the prospective date of the trial the senior judge of the Eastern District of New York, called the representatives of the Emerson Drug Co. and the Food and Drug to his chambers to discuss the possible amount of time that would be required to try the case.

When he was informed that it would possibly take several weeks, he suggested that it would be some time before his court would have opportunity or time to try the case.

He suggested that the manufacturer and the Government representatives, the Food and Drug Administration representatives, should see if they could not arrive at a satisfactory agreement in the case without the necessity of a trial with the result that an agreement was reached, I believe on December 20, 1939.

The Court then issued an order in the case, which was evidently done with the agreement of representatives of the Food and Drug Administration as well as the Emerson Co.

A quantity of bromide was agreed upon to which the Food and Drug Administration took no exception. The label following that order was studied by the Food and Drug Administration, and no objection was interposed to it.

They did not approve the label, as I understand, it being their policy not to formally approve any labels, but they interposed no objection, which is the most that is done in such cases. That put the Emerson Co. in a position of operating without objection by the Food and Drug Administration. The product continued on the market with that label under those circumstances, until sometime later, the date of which I am not sure, but I believe 1942, when the Federal Trade Commission proceeded against the advertising of various bromide and acetanilid companies including the Emerson Co., on the basis that the advertising was false.

That, has resulted, of course, in a long, drawn-out preceeding which has not terminated now.

The effect of that is that after an action had been instituted by the Food and Drug Administration and adjudicated in the court and the company was operating without any objection from the Food and Drug Administration ostensibly, the Federal Trade Commission, in 1942, instituted proceedings on ostensibly the same set of facts.

That, as I see it, puts the Federal Trade Commission in conflict or, at least, gives it dual control with the Food and Drug Administration, in that the labels and warnings to which the Food and Drug Administration had not made any objection after this proceeding in the Federal court was settled, did not meet the requirements imposed by the Federal Trade Commission after its suit was instituted; and the company was required to change the labels and cautions, under penalty of a requirement that it would be forced, otherwise, to carry them in all advertising matter, both printed and spoken, and since it would be wholly impracticable to comply with such an order the company had no other alternative and the effect of action by the Commission was to exercise control of labeling in this cast. Is that a fair statement with reference to that proceeding?

Mr. CASSEDY. No, sir; it is not. No, sir.

Mr. REECE. In what respect is it not?

MR. CASSEDY. I filed yesterday, Mr. Reece, a copy of the judgment, to which you refer. That was a judgment without prejudice to the United States or to the Emerson Drug Co. with respect to the rights of either in regard to the violations of the law.

As I understand it, there was no testimony taken in that case, but it resulted in this judgment which I have already filed.

Now, after the judgment was filed, or rather at the time of that judgment—

MR. SADOWSKI. Are you referring to this judgment here from the circuit court of appeals?

MR. CASSEDY. No, sir; I am referring to the judgment in the case of the *United States of America v. a Number of Quantities of Emerson's Bromo Seltzer*. That is a copy of the judgment, which I have a photostat of, which was filed yesterday.

That is the case which was instituted by the Food and Drug Administration against Bromo Seltzer in the District Court for the Southern District of New York.

That judgment is dated the second day of January 1940, and it is a judgment without prejudice to the rights of either party. It does not decide anything.

MR. REECE. But had not the Food and Drug Administration issued suggested labels for bromides and these other headache remedies?

MR. CASSEDY. Yes, sir. I believe the first time they suggested them was in 1939. They then sent out a mimeographed form of those suggested warnings.

Now, at the time of the settlement and disposition of this case, this Bromo Seltzer case, in the district court, the Bromo Seltzer Co. or the Emerson Drug Co. that make Bromo Seltzer, represented that they had reduced their formula.

In other words, they reduced the contents of bromides and acetanilid in that product. After the settlement and entry of this judgment in 1940, so I am very reliably informed, they submitted to the Food and Drug Administration a copy of their new proposed label.

I filed that with the committee yesterday. That label was submitted to the Food and Drug Administration, and it is my information, which can be checked by a telephone call by any member of the committee, that the representative of the Food and Drug Administration who had authority wrote the Emerson Drug Co. that the suggested label that they proposed to use was not in conformity with their suggested warnings, and they enclosed a copy of their suggested warnings, with respect to bromides and acetanilid in the same letter.

Now, they have not approved it, either directly or indirectly, but on the contrary they have disapproved it by that communication.

That was the very point I wanted to make yesterday. I am certain that Dr. Hunbar or any representative who knows the facts at the Food and Drug Administration will confirm my statements.

I am so sure of it that I would be very happy to have you call any of them. Now with those corrections, I think the other statements which Mr. Reece made are correct, except that I do not agree that our proceeding is in any wise in conflict with the Food and Drug Administration.

I think that it is in coordination and cooperation with the Food and Drug Administration.

Mr. REECE. Do you feel that the representatives of the Food and Drug Administration agreed to the order in this case on December the 20th, 1939, which the court issued, without having some understanding of what the label and the warnings would contain and without consenting to their use?

Mr. CASSEDY. Mr. Reece, I was not present. I did not talk to any of them. I have no idea of what their understanding was. I have only the record.

Mr. REECE. That would hardly be a reasonable assumption though, as I see it.

Mr. CASSEDY. I think it would be most unreasonable to assume that they had approved something that was in violation of the law.

Mr. REECE. I would concur in that suggestion that it would be unreasonable to think that they had approved something that was in violation of the law. But when they had a proceeding in court, and an agreement was reached, and the court issued an order, I would infer that the Food and Drug Administration had an understanding with the Emerson Co. as to what the label and the cautions would contain.

In any event, after the suit was settled by agreement they continued to operate until 1942 without interference from the Food and Drug Administration, whereas they had seizures made in 1939 which would certainly indicate they were doing so without objection by the Food and Drug Administration and in accordance with the court settlement.

Mr. CASSEDY. Mr. Reece, the answers to those questions could best be determined by representatives of the Food and Drug Administration.

Mr. REECE. I am stating it as my information and not stating it as a fact, because I am not in a position to do so, but I raised that point yesterday as an example of the existence of dual authority.

I was bringing it up again this morning in order to clarify what I had in mind when I brought it up yesterday.

Mr. CASSEDY. I have one more reference and I shall have finished:

With reference to the entire Reece bill, Hon. Paul V. McNutt, in his letter of May 3, 1945, to Chairman Lea, to which I have heretofore referred, states:

In our judgment, the bill is calculated to impair the benefits to the public authorized by existing legislation for the control of food, drugs, devices, and cosmetics.

Mr. REECE. But may I interject there: After the committee received that letter, I contacted Dr. Dunbar, who I assume drafted that letter, although I do not know, and suggested that in view of certain statements in that letter I would like to have an amplification of those statements.

In my letter I stated that I was interested in the last sentence of the next to last paragraph of that letter, to which I wish to call your attention now, which reads as follows:

The bill would at best effect little if any, improvement in the confused situation and attendant impairment of public protection that stem from the basic faults of differing procedures and divided responsibility for determining the truth or falsity of identical representations in labeling and advertising.

That impressed me as being a very strong statement that something was wrong somewhere. And being so impressed, then I addressed

Dr. Dunbar, who I assumed had written the letter in the first instance, a letter asking for an amplification of that statement with the result that he wrote the letter under date of July 13 which is in the record, explaining what he meant when he threw out those disturbing warnings about the impairment to the public health that obtained as result of the dual authority that existed at that time.

Now, since you are citing Mr. McNutt's letter, which evidently was drafted by the Food and Drug Administration, as support of your position, I would be interested to have you comment particularly on that paragraph in the letter, or that sentence in the letter.

MR. CASSEDY. I would be glad to, sir. That reference you make to Mr. McNutt's letter and also to Dr. Dunbar's letter relates to their views with respect to the division of jurisdiction; that is, that which was made at the 1938 sessions of Congress when the advertising was placed in the Federal Trade Commission and the labeling was placed in the Food and Drug Administration.

Those two letters are in some respects, or most respects as far as Dr. Dunbar's letter is concerned, a continuation of the views expressed at that time by Dr. Campbell and others that the jurisdiction should all be placed in one agency.

If you will let me finish, sir, I will answer anything: The whole letter that Dr. Dunbar wrote is a rehash of that old argument, and if anything, it is a criticism of Congress for having given part of the jurisdiction to one agency and part to the other.

The only criticism he makes of the Federal Trade Commission is in respect to those three cases that raise the doctrine of *res adjudicata*. The other matters would arise anyhow so far as the jurisdiction over advertising in the Federal Trade, and jurisdiction over labeling in the Food and Drug, are concerned.

MR. REECE. But leaving Dr. Dunbar's letter out of consideration, the letter by Mr. McNutt, the Federal Security Administrator, makes a very strong statement about the situation at the present time impairing the public interest, when it says:

The bill would at best effect little, if any, improvement in the confused situation and attendant impairment of public protection that stem from the basic faults of differing procedures and divided responsibility for determining the truth or falsity of identical representations in labeling and advertising.

That is not Dr. Dunbar speaking but Commissioner McNutt speaking, whom you are quoting as favorable to your view.

MR. CASSEDY. And to answer you further, I cannot express what Mr. McNutt had in his mind. I notice that you did not direct your request to Mr. McNutt. You directed your request to Dr. Dunbar to explain what Mr. McNutt meant.

I base my views on what Dr. Dunbar said as to what Mr. McNutt mean by that statement. Dr. Dunbar certainly does not show any conflict on the part of the Federal Trade Commission, that is, which you criticize, with respect to the policy which we have talked about.

MR. REECE. But would you not assume that the Food and Drug Administration drafted both letters?

MR. CASSEDY. I certainly would assume so, but when you divide it in asking me that question, I would have to make my answer in that way.

Mr. REECE. I did that, having in mind that you would lay great emphasis on the fact that Mr. McNutt signed one letter and Dr. Dunbar, his subordinate, signed the other.

Mr. CASSEDY. Yes, sir; but I cannot tell you what Mr. McNutt meant. You will have to ask him.

Mr. SADOWSKI. Mr. Cassedy, is it your desire to include in the record these decisions in the Lee case and the Willard case?

Mr. CASSEDY. Yes, sir; I think it would be helpful.

Mr. SADOWSKI. We will include those in the record.

(The decisions are as follows:)

Docket 2841

UNITED STATES CIRCUIT COURT OF APPEALS

EIGHTH CIRCUIT

No. 419, Original.—May Term, A. D. 1940

GEORGE H. LEE COMPANY, PETITIONER, vs. FEDERAL TRADE COMMISSION, RESPONDENT

PETITION TO REVIEW ORDER OF FEDERAL TRADE COMMISSION

[July 23, 1940]

Mr. Donald J. Burke for Petitioner.

Mr. William T. Chantland, Special Attorney, Federal Trade Commission (Mr. W. T. Kelley, Chief Counsel, Federal Trade Commission, Mr. Martin A. Morrison, Assistant Chief Counsel, Federal Trade Commission, and Mr. James W. Nichol, Special Attorney, Federal Trade Commission, were with him on the brief) for Respondent.

Before GARDNER and SANBORN, *Circuit Judges*, and COLLET, *District Judge*.

SANBORN, *Circuit Judge*, delivered the opinion of the Court.

The petitioner, a Nebraska corporation engaged in advertising, distributing, and selling in interstate commerce a product called "Gizzard Capsules" as a remedy or vermifuge for worms in poultry, has petitioned for the review of an order of the Federal Trade Commission requiring that petitioner "cease and desist from representing: (1) that said product is a remedy or vermifuge for all three kinds of worms in poultry; (2) that said product will remove pinworms from poultry; (3) that said product will remove tapeworms from poultry, unless it be represented with equal conspicuousness that this product merely shears off the strobilae or chain of segments of the tapeworm, leaving the head of the worm, capable of growing new segments, attached to the intestines of the fowl."

The petitioner challenges this order upon one ground, which is that the representations which the Commission found to be false and misleading and which are prohibited by its order, had previously been adjudicated by a court, of competent jurisdiction not to be false representations, in a libel proceeding brought by the Government to condemn forty-seven packages of "Gizzard Capsules," which adjudication it is claimed was binding upon the Commission.

The libel proceeding was instituted on August 8, 1934, in the United States District Court for the Western District of Missouri. The United States in that proceeding charged that this same product was "misbranded in violation of the Food and Drugs Act, Section 8 as amended, Paragraph Third, in the case of drugs, in that the following statements, appearing upon and within the package of the product, are statements regarding the curative or therapeutic effect of the article and are false and fraudulent, in this, that the articles contains no ingredient or combination of ingredients capable of producing the effect claimed, and that the same were applied to the said article knowingly and in reckless and wanton disregard of their truth or falsity: (Package label—same for all sizes) 'For * * * Large Tape Worms and Pin (Ceca) Worms in Chickens and Turkeys * * * For the Removal of * * * Large Tape and Pin (Ceca) Worms in Poultry * * * delivers the medicine, undiluted, fresh and full strength directly upon the worms in the intestines. * * *' (Circular) 'For * * * Large Tape and Pin Worms in Chickens and Tur-

keys * * * To lay well, hens must be reasonably free from worms * * *
 Worm your flock with Gizzard Capsules; * * * to expel the worms * * *
 the exact full strength dose of worm medicine is emptied into the intestines
 and reaches the worms. * * *"

The petitioner, as claimant and manufacturer of the product, defended the libel proceeding. It denied that the labels or circulars contained false statements as alleged by the government, and denied that its statements were either false or fraudulent or that the capsules were incapable of producing the effects that it was represented they would produce. There were, then, two issues of fact presented for determination in the libel proceeding: (1) Were the challenged statements contained in the labels and circulars false? (2) Was the petitioner guilty of fraud in making such statements? After a trial, the court resolved both of these issues in favor of the petitioner and entered a decree dismissing the proceeding. The government took no appeal, and the decree became final.

Thereafter on June 11, 1936, the Federal Trade Commission issued its complaint charging petitioner with the use of unfair methods of competition in interstate commerce within the meaning of the "Federal Trade Commission Act." Sections 41-58, U. S. C. Title 15, to the injury of competitors, by soliciting the sale of and selling "Gizzard Capsules" upon "extravagant, deceptive, misleading and false statements regarding the therapeutic value, efficacy and effect" of its product in advertisements on labels and in pamphlets, newspapers, and magazines. The Commission further charged that "as a result thereof, substantial injury has been, and is now being, done by respondent [petitioner here] to substantial competition in commerce among and between the various States of the United States and in the District of Columbia."

The petitioner moved to strike so much of the complaint as was based upon representations as to the efficacy of its product for the treatment of large roundworms, large tapeworms, and pinworms in poultry, on the ground that in the libel proceeding the falsity of such representations was in issue, and that the court in its decree had determined that they were not false, and, in so doing, had necessarily determined the product to be efficacious for the purposes for which it was intended and sold. The motion to strike was denied, and the petitioner filed its answer denying the allegations of the complaint and asserting the defense of *res judicata*. The Commission overruled that defense, apparently upon the theory that the decree in the libel proceeding was not binding upon it; and, after extended hearings, it found that petitioner, in advertising its product, represented that it was a single remedy for the several kinds of worms in poultry and that this single remedy for all kinds of worms was better than separate remedies for each kind of worm; and also found "that respondent's [petitioner's] product is not an effective vermifuge for all three kinds of worms, nor is it better than separate remedies for each kind of pin worms or for tape worms in poultry. When administered to fowl infested with tape worms this product tends to shear off the tape worm strobilae or chain of segments, leaving the tape worm heads attached to the intestines of the fowl. These heads are capable of growing, and do quickly grow, new segments." The Commission further found that: "Respondent's representations, herein described, have had and now have a tendency and capacity to, and do, mislead and deceive the purchasing public into an erroneous and mistaken belief concerning the therapeutic value, efficacy, and effect of 'Gizzard Capsules.' A substantial portion of the purchasing public, as a direct result of said mistaken and erroneous belief, have purchased respondent's product with the result that trade has been diverted unfairly to the respondent from competitors likewise engaged in the business of selling and distributing products designed for similar usage, who truthfully advertise and represent the properties of their respective products and the results that may be obtained from their use. As a result thereof, substantial injury has been done and is now being done by respondent to competition in commerce among and between various states of the United States and in the District of Columbia." The Commission concluded that the acts and practices of petitioner complained of were all to the prejudice of the public and of petitioner's competitors and constituted unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act. It thereupon entered the order complained of.

The petitioner has not included in its record in this Court the testimony taken before the Commission and concedes that, unless the Commission was precluded from entering its order because of the decree in the libel proceeding, the order must stand. It denies the right of the Commission to relitigate any

issues which were determined in the libel proceeding, and to make its findings on such issues, either in whole or in part, the basis for its order.

There is force in respondent's contention that the issues tried and determined in the proceedings initiated by and had before it differed in essential particulars from those tried and determined by the court in the libel proceeding. It is apparent, however, that the government—having failed, in the libel proceeding, to secure a determination that the "Gizzard Capsules" were misbranded and that the representations made by the petitioner on labels and circulars were false on the ground that the product, which concededly would remove large roundworms from poultry, would not completely remove large tapeworms or pinworms—then initiated this proceeding through the Federal Trade Commission to secure a determination that the same or substantially the same representations which were asserted to be false and fraudulent in the libel proceeding were in truth and fact false and misleading and therefore constituted an unfair method of competition in commerce within the meaning of the Federal Trade Commission Act. Although the remedies sought by the government in the two proceedings were different—condemnation in the first, and a cease-and-desist order in the second,—it is obvious that the alleged falsity of the representations of the petitioner with respect to the therapeutic value and effectiveness of its product constituted the main basis for each of the proceedings; that in the libel proceeding the court determined that the representations that the product was a remedy for tapeworms and pinworms as well as large roundworms were not false, while the Commission later determined that the representations with respect to pinworms and large tapeworms were false and misleading. It is equally obvious that the Commission completely disregarded the effect of the decree entered in the libel case in conducting its proceedings and in making its findings of fact, conclusions of law, and order.

Where the underlying issue in two suits is the same, the adjudication of the issue in the first suit is determinative of the same issue in the second suit. *Sunshine Anthracite Coal Co. v. Adkins* (— U. S. —, 60 S. C. 907, 916). "There is privity between officers of the same government so that a judgment in a suit between a party and a representative of the United States is *res judicata* in relitigation of the same issue between that party and another officer of the government. See *Tait v. Western Maryland Railway Co.* (289 U. S. 620). *Sunshine Anthracite Coal Co. v. Adkins*, supra, (p. 917 of 60 S. Ct.). "Where a suit binds the United States, it binds its subordinate officials." *Sunshine Anthracite Coal Co. v. Adkins*, supra, (p. 917 of 60 S. Ct.). The United States may not relitigate the same issue in successive libel proceedings involving different quantities of the same product (*George H. Lee Co. v. United States*, 9 Cir., 41 F. 2r 460), nor may it relitigate the same issue in any proceeding in which the parties are the same and the product is the same. The rule is "that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified." *Southern Pac. R. Co. v. United States* (168 U. S. 1, 48); *Mitchell v. First National Bank* (150 U. S. 471, 480-481); *Tait v. Western Maryland Railway Co.* (289 U. S. 620, 623).

Unless a question which a court or an administrative board has power to decide is to be regarded as conclusively settled as between the parties by the final decree of the court or the final order of the board, there can be no end to a controversy except as the result of the financial disability of one of the parties. If the question of the falsity of the representations of the petitioner contained on its labels and circulars had been determined adversely to the petitioner in the libel proceeding, it could not have been heard to say in the proceedings instituted by the Commission that such representations were true. By the same token, the United States and its instrumentality, the Commission, were not after the decree in the libel proceeding, entitled to say that the representations made by the petitioner which had been finally adjudged not to be false, were in fact false. The government had had its full day in court on that issue, had lost its case, and could not collaterally attack, either directly or indirectly, the decree entered against it.

The contentions of the respondent that the court in the libel proceeding merely determined that the petitioner had not intentionally misrepresented the therapeutic qualities of its product, whereas the Commission in the proceeding

before it ruled that the petitioner's representations were untrue and misleading, is not borne out by the record. The court in the libel proceeding determined that the representations, directly challenged and distinctly put in issue by the government, were not false, and, in doing so, necessarily determined that the product of the petitioner was a remedy for the three kinds of worms in poultry. The Commission, on the other hand, has determined that the representations upon which the libel proceeding was based were in fact false and misleading. The main underlying issue in both the proceedings was the same, namely, Are the representations made by the petitioner false because the product has not the therapeutic qualities claimed for it?

Whether the Commission, if it had accepted as a fact that the representations which had been alleged to be false in the libel proceeding were not false, could have found other representations in the advertising of the petitioner which would have justified findings and conclusions that petitioner had been guilty of unfair competition in interstate commerce, we are not asked to decide, and manifestly could not decide upon the record presented. The order of the Commission is based, in large part at least, upon its finding that the representations that petitioner's product was an effective remedy or vermifuge for all three kinds of worms were untrue. The Commission thus plainly failed to accord to the decree in the libel proceeding the effect to which it was entitled. The Commission redetermined an issue which was already settled by a court of competent jurisdiction and reached a contrary conclusion. Under the circumstances, we think that its order cannot stand.

The order is vacated without prejudice to such further proceedings as are not inconsistent with this opinion.

Docket 3100

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. S398. October Term, 1943, January Session, 1944

THE UNITED STATES OF AMERICA, LIBEL-APPELLANT

VS. WILLARD TABLET COMPANY, CLAIMANT-APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN
DISTRICT OF INDIANA, INDIANAPOLIS DIVISION

March 7, 1944

Before SPARKS and MAJOR, *Circuit Judges*, and LINDLEY, *District Judge*.

MAJOR, *Circuit Judge*. The United States (libelant) instituted this proceeding for condemnation of a quantity of Willard's Tablets shipped in interstate commerce on the ground that the labeling thereof was false, in violation of the Food, Drug, and Cosmetic Act, 21 U. S. C. A. 352 (a), 352 (f), and the articles were therefore subject to seizure and confiscation (21 U. S. C. A. 334). The claimant filed an answer to the government's amended libel, setting up three affirmative defenses. The lower court sustained the claimant's defense of *res judicata*, based upon a prior proceeding before the Federal Trade Commission, and dismissed the action. From the order of dismissal, the government has appealed.

The only question for decision is whether the proceedings before the Federal Trade Commission are *res judicata*, and, therefore, binding upon the District Court and determinative of the issues involved herein.

The government urges as a basis for overruling the lower court's holding that (1) the issues herein involved were not determined by the Federal Trade Commission; (2) unaffirmed decisions of the Federal Trade Commission do not have the finality necessary to constitute *res judicata*; (3) there is no mutuality of estoppel; (4) the lower court's holding would impair the enforcement of the Food, Drug, and Cosmetic Act; and (5) the District Court improperly dismissed the amended libel as to that part alleging that the directions for use on the labeling were inadequate.

The facts as stipulated and adopted by the lower court effectively dispose of the government's first contention. The stipulation discloses: (1) that the state-

ments relied upon by the government to uphold the charge of misbranding are identical with those approved by the Federal Trade Commission; (2) that the fundamental issue of fact as to whether the Willard Tablets would give the relief claimed was considered by the Federal Trade Commission. We, therefore, have the incongruous situation of one branch of the government approving the method now pursued by the claimant and another branch seeking to condemn. This is, to say the least, placing claimant in an embarrassing situation and should be avoided if possible.

In *George H. Lee Co. v. Federal Trade Commission*, 113 Fed. (2d) 583, the Circuit Court of Appeals for the Eighth Circuit upheld, and we think properly so, the defense of *res judicata*. Therein, the condemnation proceedings were instituted prior to the action before the Federal Trade Commission. The court on page 585 said:

"Although the remedies sought by the government in the two proceedings were different—condemnation in the first, and a cease-and-desist order in the second—it is obvious that the alleged falsity of the representations of the petitioner with respect to the therapeutic value and effectiveness of its product constituted the main basis for each of the proceedings * * *."

And further, on page 586:

"If the question of the falsity of the representations of the petitioner contained on its labels and circulars had been determined adversely to the petitioner in the libel proceeding, it could not have been heard to say in the proceedings instituted by the Commission that such representations were true. By the same token, the United States and its instrumentality, the Commission, were not, after the decree in the libel proceeding, entitled to say that the representations made by the petitioner which had been finally adjudged not to be false, were in fact false. The government had had its full day in court on that issue, had lost its case, and could not collaterally attack, either directly or indirectly, the decree entered against it."

And on page 585, the court stated:

"Where the underlying issue in two suits is the same, the adjudication of the issue in the first suit is determinative of the same issue in the second suit."

As was stated by the Supreme Court in *Sunshine Coal Co. v. Adkins*, 310 U. S. 381, 402:

"A judgment is *res judicata* in a second action upon the same claim between the same parties or those in privity with them. *Cromwell v. County of Sac*, 94 U. S. 351. There is privity between officers of the same government so that a judgment in a suit between a party and a representative of the United States is *res judicata* in relitigation of the same issue between that party and another officer of the government. See *Tait v. Western Maryland Ry. Co.*, 289 U. S. 620."

The government's second contention seems to rest solely upon the provisions of the Federal Trade Commission Act, as amended (15 U. S. C. A. 45 (b) (g)), that the Commission may, under certain conditions, modify its order after the expiration of time for appeal. Therefore, the contention is that such power of modification leaves an unappealed order without that finality essential to invoke the doctrine of *res judicata*. With this contention we do not agree.

The Act provides that an order of the Commission shall become *final* at the expiration of sixty days if no appeal is taken (45 (g)), and further provides for heavy penalties for violation of such order (45 (l)). It further provides that "the findings of the Commission as to the facts, if supported by evidence, shall be conclusive." Thus, even the reviewing court in the same proceeding is bound by the findings of the Commission. To allow their finality to be attacked in a collateral proceeding would seem to run counter to the provisions and purposes of the Act. As was said in the case of *United States v. Piuma*, 40 Fed. Supp. 119, 122:

"Is it the province of the court to try the truth or falsity of the defendant's advertisements already found to be false by the Commission? The answer to this question depends upon the meaning to be given the word 'final' as used in subsection (g). The purpose of the provision was to bring the doctrine of *res judicata* into the Federal Trade Commission's jurisprudence. * * * This court will not now retry that issue."

With this construction of the Act we agree. We must, therefore, uphold the decision of the lower court that the issues of fact tried by the Commission have a finality upon which *res judicata* may be predicated.

We agree with appellee's contention that mutuality of estoppel is not herein involved. We have held that the facts found by the Federal Trade Commission are conclusive and binding upon the District Court. The same result would obtain if the government were depending upon these findings to sustain its charge of misbranding. The doctrine of *res judicata* is not dependent upon mutuality of estoppel by judgment, as is contended by the government. The cases cited in support of this contention are not applicable to the instant situation.

What we have heretofore said sufficiently disposes of the argument that the decisions of the Federal Trade Commission should not be allowed to impair the enforcement of the Food, Drug, and Cosmetic Act. Under the facts stipulated herein and to which this decision is limited, there can be no impairment of the enforcement of the afore-mentioned Act.

The last contention of the government to be considered is that the plea of *res judicata* was directed to but one count of the libel and that it is entitled to a trial upon the other count, *i. e.*, upon the issue of whether the labels give adequate direction for use. We are of the view that this contention is not tenable. As appears from the record, this case was submitted by both parties upon a stipulation of "all of the facts." The parties so understood it and so did the lower court. The suit was tried upon the issue of *res judicata* as to the whole libel, and the government's contention to the contrary comes too late.

The judgment of the District Court is

AFFIRMED.

MR. O'HARA. Were you through, Mr. Cassedy?

MR. CASSEDY. Yes, sir.

MR. O'HARA. Mr. Cassedy, yesterday, you introduced into the record the testimony with respect to the Larned Corp., the testimony of Dr. Sheldon Payne.

I have been looking through this this morning here, and I was curious as to where the situs of the trial of that case was originally? Was the Larned case filed here in Washington?

MR. CASSEDY. That testimony was taken in Los Angeles.

MR. O'HARA. I understand that. I notice that it was taken in Los Angeles. I was curious as to whether the case was conducted out there, or was the case conducted in Washington?

MR. CASSEDY. Only the taking of the testimony of Dr. Payne, in that particular case, and in other cases another doctor testified. I believe as to the Miles Laboratories and Capudine cases, Dr. Payne also testified, and Dr. Burns testified.

MR. O'HARA. I am talking about this particular case, the Larned case, which I assume was the only case.

MR. CASSEDY. I had not outlined the procedure in the trial of the case before the Commission, because Judge Davis, I understand, will deal with that.

But I will say that in the trials of these cases we set hearings anywhere in the United States, and we take the court to the witness.

MR. REECE. Do you mean anywhere or everywhere?

MR. CASSEDY. Everywhere.

MR. O'HARA. I was interested in the fact that a great many expert witnesses right here in the vicinity of Washington are qualified to testify with respect to the subject. I would like to know why it was necessary to go out there to Los Angeles and take the testimony of Dr. Payne, a gynecologist.

MR. CASSEDY. Such cases, sir, are prepared in advance. The trial attorney, together with the medical advisory division, compile the medical literature and articles in medical journals and from that

literature select the best qualified experts on the subjects involved.

Then we take the Commission to the witness. One of the methods of preparation, I referred to yesterday in answer to something Mr. Reece had said about the availability of information dealing with therapeutics.

I mentioned that in those very cases we got together large volumes of articles that were published in medical journals, the American Medical Association Journal, many State medical association journals, and all medical literature that could be had on the subjects of those drugs.

We read those and studied them. We picked out of those articles the scientists who in our opinion were the best qualified in the whole United States.

Then we went to those witnesses. At the time that Dr. Payne, since he has been made the subject of discussion, wrote an article regarding acetanilid, he was then located at the Duke University Hospital at North Carolina.

Mr. O'HARA. He wrote it while he was in medical school, as the testimony shows.

Mr. CASSEDY. Yes. And I want to point out that two other scientists down at Duke University, Drs. Hanes and Yates, also wrote articles based upon a study of the same subjects. They wrote an article, the title of which, if I remember correctly, was "400 cases of bromide intoxication."

They studied those cases in that hospital, and as a result of their study, they wrote these articles.

Mr. O'HARA. You are talking about the study of these two other experts, not Dr. Payne's?

Mr. CASSEDY. Dr. Payne was there as their assistant and worked with them in the same hospital. And as a result of their combined study, Dr. Payne having studied the subject of acetanilid and the others the subject of bromides, these articles were published.

And they were so widely recognized by all scientists over the United States as being the very best in the field, we thought it would be best, in representing the public's interest, as the Commission attempts to do and does do, to go to wherever these scientists were located and get their testimony in the record.

We have done that in numerous instances with respect to other people.

Mr. O'HARA. I was impressed with the fact that it obviously follows from the testimony that Dr. Payne never pursued any apparent interest in the subject of this article which had been written by him when he was a student at Duke University, and in fact all of his practice had been first in obstetrics and second in gynecology.

This certainly does not have any relation to toxicology or the use of drugs.

Mr. CASSEDY. I would admit that, but that does not detract from his qualifications as an expert on the study of acetanilid.

Mr. O'HARA. It would certainly affect his qualifications in my mind.

Mr. CASSEDY. Let me point this out: There are but a few scientists in that field in the United States who have made a study of acetanilid.

Mr. O'HARA. Well, he certainly has not made one and has not shown any interest in keeping up with that subject which he had studied while he was in medical college, by his own testimony.

You would agree on that, would you not, Mr. Cassedy?

Mr. CASSEDY. I would not say that his failure to keep up that study changed anything with relation to what he had learned during the time he made that study.

I also add that that criticism could not be interposed against Dr. Hanzlik, because he is acknowledged as one of the outstanding experts in that field. His testimony is also on file here for your consideration.

Mr. O'HARA. I just wondered if the decision on the Larned case was based upon the testimony of Dr. Payne.

Mr. CASSEDY. There has been no decision in that case. That case is pending.

Mr. O'HARA. Well, I have had experience in the qualification of expert witnesses, both medical and otherwise, and I certainly was not impressed, not saying this in reflection upon Dr. Payne or upon you either, Mr. Cassedy, but as to his qualification as an expert on the subject on which he was apparently attempting to testify, which would justify a trip to Los Angeles for the group necessary to take his testimony.

Mr. CASSEDY. Mr. O'Hara, there were so few experts on the subject of acetanilid that we thought it best to get as many of them or all of them that were in existence.

From my knowledge, Dr. Payne was one that was in existence, and we could get him, so we took him for what he was worth. You have done that, I am sure, in your cases.

Mr. REECE. Did you say a while ago that you considered him one of the outstanding specialists in the field of acetanilids?

Mr. CASSEDY. I said that the work he did and the report he made in the medical association journal, the article that he wrote, was considered one of the best that has been done by scientists in that field, and it is so regarded.

Let me say this: His testimony is not in any sense in contradiction to the other scientists against whom you could not make the same objection.

Dr. Hanzlik, as I cited you, is in exact accord with Dr. Payne.

Mr. REECE. You do not think you could have found a doctor nearer than Los Angeles that had been as well qualified as an expert as he? That is, you had to travel to Los Angeles, to take his testimony because of its superiority over the testimony of any doctor available in the East?

Mr. CASSEDY. Yes.

Mr. REECE. Do you think you could have found in the medical association somewhere nearer than Los Angeles, particularly on the eastern seaboard, a witness who was as well qualified on this subject as Dr. Payne?

Mr. CASSEDY. I think we can now, sir. The fact that we could not at the time of taking his testimony, was because other experts that might have been available were then in the Army and out of the country, and we could not get them until they returned.

They have returned and we intend to get them.

Mr. SADOWSKI. We have had two other witnesses on that same subject, have we not?

Mr. CASSEDY. We have had numbers of them on bromides, but only two on acetanilid.

Mr. REECE. The thing that impresses me: Take in the matter where the Federal Trade Commission instituted a proceeding here, where I assume it required an examiner and an attorney, and then an attorney for Miles Laboratories to be in attendance at the hearings. Two witnesses were in Tuscaloosa, one was in St. Augustine, Fla., one was in Warren, Pa., one in Washington, D. C., one in Baltimore, one in Dallas, one in Los Angeles, and one in San Francisco. That would appear to be a wide area which you covered, since all you had were competent specialists it would seem as if they might have been found in a more restricted area.

Who was the one in Los Angeles?

Mr. CASSEDY. Dr. Payne.

Mr. REECE. Hanzlik was in Los Angeles?

Mr. CASSEDY. No, Dr. Payne.

Mr. REECE. The San Francisco one?

Mr. CASSEDY. I think you will find there were two at Los Angeles, Dr. Burns and Dr. Payne.

Mr. REECE. And in San Francisco, one?

Mr. CASSEDY. That is correct.

Mr. REECE. Now these were all medical witnesses?

Mr. CASSEDY. Yes, sir.

Mr. REECE. Testifying on the therapeutic effect of acetanilid?

Mr. CASSEDY. Only Dr. Payne and Dr. Hanzlik testified regarding acetanilid. The others testified regarding bromides, not only on the therapeutic effect but the toxic effect.

Mr. REECE. That is, these medical witnesses testified on the bromides and acetanilid? The first thing that impressed me in looking over that list of witnesses and the places where the testimony was taken was traveling over such a wide area of the United States and right in the midst of war when travel was tight. I was wondering if qualified witnesses could not have been found in a more restricted area and closer home, so to speak.

Now, take Dr. Hanzlik, a man doubtless well trained; and who has been at the Stanford University for how many years?

Mr. CASSEDY. I do not recall, but he stated that.

Mr. REECE. Well, a long period of years. He does not seem to have a medical license in California.

Mr. CASSEDY. He is not practicing medicine, Mr. Reece.

Mr. REECE. He states that at no time has he administered medicine to human beings.

Mr. CASSEDY. He is a pharmacologist.

Mr. REECE. He is not an M. D.

Mr. CASSEDY. He does not administer medicine to people.

Mr. REECE. He is not an M. D. then?

Mr. CASSEDY. I do not recall, but he is not practicing medicine. The testimony will show whether he is an M. D. or not, but he is not practicing medicine.

He is teaching pharmacology at the Stanford University Medical School.

Mr. REECE. But after reading his testimony and Dr. Payne's, I was wondering what particularly qualified them that would justify the

Commission in incurring the expense and the putting of companies involved to the expense of going to Los Angeles and San Francisco to take their testimony unless it was on the basis that there was no one on the eastern seaboard that was qualified to speak on those subjects as those doctors.

Mr. CASSEDY. There were none as well qualified on the eastern seaboard at that time that were available.

Mr. REECE. I would say that the eastern seaboard was not in too good a position from a medical standpoint, then?

Mr. CASSEDY. Let me say this, Mr. Reece, pointing out something that you have not considered: That is, as illustrated in the Bromo-Seltzer case—the respondent in the Bromo-Seltzer case has secured its witnesses from a very wide range, all over, you might say, the eastern half of the United States.

I have been to New York on many occasions, to New Haven, Conn., on one or two occasions, down to Atlanta, Ga.

I have been to Chicago and to Baltimore a number of times, and other places scattered all over this country to take the testimony for the respondents.

Mr. REECE. The two witnesses at Tuscaloosa were with the State insane asylum?

Mr. CASSEDY. Yes; Brice Hospital.

Mr. REECE. I am not stating that as a reflection upon them.

Mr. CASSEDY. They have devoted their lives to that, sir.

Mr. REECE. But now St. Elizabeths Hospital also is for the insane. Would not you say there was someone on the staff at St. Elizabeths who would be qualified to testify on that subject?

Mr. CASSEDY. I understand there is one, and we intend to ask him to testify on that subject.

Mr. REECE. If these institutions nearby had competent staffs, I was wondering why witnesses could not be obtained from them.

Mr. CASSEDY. I assure you that we will obtain every qualified expert; every qualified expert on that subject that is available, to fully meet similar experts that the respondent may secure or try to secure, no matter where they are located.

Mr. SADOWSKI. You had stated previously that most of these experts were in the service at the time?

Mr. CASSEDY. Yes, it was difficult to try these cases.

Mr. HOWELL. In answer to a question by Mr. O'Hara a moment ago, did I understand you to say that the Federal Trade Commission and the respondent sat down at the beginning of these suits and agreed upon the witnesses that would be used by both sides?

Mr. CASSEDY. No, sir.

Mr. HOWELL. How is it done? Does the Commission sit down and decide as to the witnesses?

Mr. CASSEDY. The Commission's trial attorneys decide upon the witnesses they intend to use, and they request from the Commission subpoenas, just as you would in a court proceeding.

We file a request for a trial examiner and the trial examiner is usually appointed. Then we request the setting of these cases at such dates and at such times as will be convenient to the attorneys representing the respondents. We agree on those dates. We make it as agreeable as possible. On numbers of occasions we have postponed

cases, or hearings rather, so that respondents' counsel could meet other engagements and then be at these hearings.

At that time, we take the testimony of the witnesses that have been subpoenaed in advance. Now, the respondents are supplied with information as to who these witnesses will be, so that in case they are experts, such as these we have mentioned, they can go to the literature and get what they have written and be able to properly cross-examine those experts.

I assure you they do properly cross-examine them. On the respondent's side, respondent follows the same procedure and furnishes to the trial attorneys for the Commission the names of witnesses they intend to use, and they set their hearings at such places as they may desire, and then we go to those hearings.

They put on their witnesses, directly examine them, and turn them over to the trial attorney for the Commission to cross-examine.

In these cases that I have mentioned, I have acted as trial attorney in all of them, and am very familiar with the procedure in all of them.

Mr. HOWELL. Mr. Cassedy, then it lies entirely within the power of the Commission's attorneys in making out one of these cases, in the selection of their witnesses and their geographical location within the United States or elsewhere, to practically put a little company out of business by reason of the expense that would be saddled on to him in sending their counsel around and defending themselves against the various witnesses that the Commission had selected?

Mr. REECE. May I interject? The Small Business Bureau wrote a letter, strongly endorsed the passage of this bill, and that was one of the considerations.

Mr. CASSEDY. I would think that the violation of the law should be considered rather than the size of the business.

Mr. WHITELEY. May I make a brief statement with respect to the questions submitted to the witness by Congressman Reece and Congressman Howell? Because it is my responsibility as to approving the travel incurred.

The Commission has a very limited amount of money, which is appropriated by Congress, and which is earmarked for travel. We scrutinize very carefully in every case the necessity for travel and only make such travel as we consider to be necessary in the public interest to protect the public in the establishment of the allegations of the complaints.

We have not the funds to spend on travel that these corporations, particularly in these headache remedy cases, have. However, while we are at that disadvantage, we have the advantage of being able to call upon and to rely upon the most eminent doctors and scientists in the United States, who contribute their services without any charge because of the public interest involved.

Now, I make this statement because there is either an implied or an express criticism made of the Commission, and an intimation that the Commission wastes the public funds in taking this testimony.

I want to emphasize that I emphatically deny that that is done.

Mr. REECE. The intimation that I had in mind, Dick, did not turn on the spending of money but rather to the possibility of the Government shopping around, so to speak, to get witnesses that were favor-

able, rather than taking a well-qualified man wherever he might be found.

Mr. WHITELEY. That is true, Congressman, and if we can get a well-qualified man nearer home, we will take him; if not, we will have to go farther away.

Mr. O'HARA. Did you read the testimony of Dr. Payne which was taken out in Los Angeles?

Mr. WHITELEY. No; I did not.

Mr. O'HARA. I wish you would, please.

Mr. HOWELL. I want you to understand, Mr. Whiteley, that I am not at all antagonistic to the work that the Federal Trade Commission is doing. But I asked that question because I can see, and I am sure that you can, in the case of a small company with limited funds, that the Commission does have within its power the using of witnesses—

Mr. WHITELEY. Such occasions have arisen in the past, and in those cases, we do everything possible to accommodate those small companies by avoiding any unnecessary expense.

Mr. HOWELL. I am glad to have that statement in the record.

Mr. CASSEDY. Let me say that the businesses we deal with are those engaged in interstate commerce, and I would not say that one engaging in interstate commerce is a small business.

Mr. O'HARA. In that connection, how many instances have you had during the last few years where prosecutions have been brought against small companies and they have folded up and said, "Well, we will have to go out of business." I mean before going to trial.

Mr. CASSEDY. I do not know of any. The orders in our cases are stop orders. They merely tell them to stop the dissemination of these false representations.

Mr. O'HARA. Did that not happen in the case recently here brought against the Richmond concern, down in Richmond, Va., where the company came in without counsel and said, "We are quitting; we haven't the money to carry on."

Mr. WHITELEY. It may have happened, Congressman. I could not recall any specific case but it may have happened that if the business of that company was entirely supported by and based upon false advertising and the Commission issued its order directing it to stop that, and the company could not carry on its business without continuing such false advertising, manifestly it would have to close up.

Mr. O'HARA. Well, if that were true, but I do not know what the facts were.

Mr. REECE. Just one other observation or statement, since you referred to the trial examiner a while ago: It appears that in some of these cases the trial examiner was changed. Is it the custom when a trial examiner is assigned to a case to let him complete that case? Or do you switch examiners?

Mr. CASSEDY. It has been the custom to have the same trial examiners as far as possible, but sickness or the fact that the trial examiner's staff is small and the trial examiner may be engaged on another case; or I believe in some instances, where the trial examiner died during the trial—there have been changes.

Mr. REECE. But if a trial examiner was temporarily indisposed or temporarily engaged in other work, would it be your practice to assign another trial examiner to a case?

Mr. CASSEDY. The circumstances would determine that.

Mr. REECE. I think without reference to this bill that is a situation that should be very carefully considered, and I am sure it is, so as not to arouse suspicion.

Mr. CASSEDY. Let me answer that: The recent decision in the Buchsbaum case in the seventh circuit reversed a decision of the Commission because of a change in trial examiners when a trial de novo was not granted, when the new trial examiner took over.

Mr. SADOWSKI. And ordinarily it would not be advantageous to the FTC to make changes in examiners?

Mr. DAVIS. I want to say that the Commission avoids it whenever possible, and in almost every instance where for some reason there has been a change, it has been with the agreement of counsel for the respondent.

Mr. SADOWSKI. The committee stands recessed until Monday morning at 10 o'clock.

(Thereupon, at 12:45, March 8, 1946, the committee recessed until 10 a. m., Monday, March 11, 1946.)

AMEND FEDERAL TRADE COMMISSION ACT

MONDAY, MARCH 11, 1946

HOUSE OF REPRESENTATIVES,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D. C.

The subcommittee reconvened at 10 a. m., Hon. George C. Sadowski, chairman of the subcommittee, presiding.

Mr. SADOWSKI. The committee will come to order.

Our first witness this morning is Mrs. Mary Keyserling.

Will you kindly state your name and the organization you represent?

Mrs. KEYSERLING. My name is Mary Dublin Keyserling. I represent the American Association of University Women.

Mr. O'HARA. What is the address of your organization?

Mrs. KEYSERLING. 1634 I Street NW.

STATEMENT OF MRS. MARY DUBLIN KEYSERLING, REPRESENTING AMERICAN ASSOCIATION OF UNIVERSITY WOMEN

Mrs. KEYSERLING. The American Association of University Women is strongly opposed to the provisions of H. R. 2390, to amend the act creating the Federal Trade Commission.

It contends that the amendments offered by the bill are not only wholly unnecessary but would, if enacted, deprive the consumer of present protection against misleading and highly dangerous advertising, by making it impossible for the Federal Trade Commission effectively to control the advertising of potentially dangerous cosmetics and patent medicines.

Further, the bill is detrimental to public interest, in our view, in that by lowering present penalties for violations of an order of the Commission, now too low to afford adequate consumer safeguards, it would make of penalties mere license fees.

The proposed bill would, we believe, deprive the public of much of the invaluable protection that has been given by the Federal Trade Commission, in that the amendments proposed would break down the Commission's essential administrative function and by vastly increasing the number of cases which would be taken unnecessarily into court, tie up its limited resources in long-drawn-out expensive and fruitless proceedings.

Consumer protection from fraud, potentially dangerous drugs and cosmetics, misleading advertising and unfair competitive practice is far from fully effective today.

We regard with serious misgivings any attempt which would break down any protection for which those with the public interest at heart,

the American Association of University Women among them, have fought for over 30 years.

This is no time to tinker with established procedures which years of experience have proved fair and reasonable and beyond question of benefit to the community. This is not time to concede to the demands of small special interest groups who shortsightedly put their concern for private gain above the public benefit.

These are the facts as we see them :

This bill would make a very important change in the Federal Trade Commission Act, (sec. 15) which now defines false advertising as that which is misleading in a material respect.

In determining whether advertising is misleading, the present law requires that there be taken into account "Not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations or," and this I underline, "material with respect to consequences which may result from the use of a commodity to which the advertisement relates under the conditions prescribed in said advertisement or under conditions as are customary or usual."

The last part of this requirement has proved especially essential to public protection. The use of drugs is a complicated business. The consumer, drawn to a preparation by an advertisement, may not know that its use may be habit-forming, that it may cause permanent functional injury, that it may produce insomnia or far more injurious consequences, unless he is so warned.

Because of the protection afforded by the present law, the Federal Trade Commission has been able to require the advertisers of certain products to reveal the possible consequences of which the consumer should be fully apprised.

We consumers are more than entitled to know that the use of a given preparation may result in grave injury. Far from being too strong, we hold that the present law is weak, in that the consumer is now informed of potential danger but can still buy a product which could result in permanent injury to the heart, to tissues, or to organic functions, or cause other irreparable damage.

Why, then, we ask, should the phrase which requires an indication in advertising of these potential dangers, where they clearly exist, be stricken from the law as this bill proposes? The warning in advertising now required is little enough protection of the consumer. If the law is changed in this respect as proposed, we cannot but foresee an increased sale of products which have proven seriously harmful to some users in the past and of menacing new ones. It is not enough to prevent deception resulting from ambiguity and indirection or from false statement, all that H. R. 2390 would require. To do away with the indication now required of potential consequences of the use of a drug or other product when used under customary or usual conditions, or under conditions prescribed in the advertisement is not only unjustified: in our view it is dangerous in the extreme.

A second serious danger contained in the proposed bill is the provision which would put a ceiling of \$10,000 on penalties imposed on violators of an order of the Commission and reduce from \$5,000 to \$1,000 the penalty for each violation.

We hold that present penalties are not adequate deterrents of violation on the part of firms with the immense resources of present-day corporations. Further, to reduce this deterrent would be to make of it merely a license fee rather than a fine. We would point out that \$5,000 would far from pay for one good advertisement in a national magazine or over the air.

Perhaps the most serious dangers of the bill, in our minds, are those which strike at the heart of the powers of the Commission. At the present time, any order of the Commission to cease and desist certain practices is subject to review by an appropriate United States Circuit Court of Appeals at the choice of the affected party.

The full record of the Commission's proceedings is in all such cases certified to the court and, as is well-known, the Commission's findings as to the facts, if supported by evidence, are held conclusive.

This has been the standard administrative procedure under the law, not only of the Federal Trade Commission but also of other quasijudicial governmental agencies, such as the Interstate Commerce Commission, the Federal Communications Commission, the Securities and Exchange Commission, and others.

Those against whom cease and desist orders have been issued have the fullest protection of the courts against arbitrary or unreasonable action, and, as is evidenced by the record, the courts have not hesitated in a few cases where the courts have found the Commission's orders were not supported by substantial evidence, to set the Commission's orders aside.

We can see no reason for any change in the present procedures of the Federal Trade Commission. H. R. 2390 would, if enacted, require that the Commission's findings as to the facts be held conclusive by the court only "if supported by the preponderance of the evidence."

The implications of this change would make one wonder whether some supporters of this proposal do not seek to cripple the powers of the Commission rather than to assure that justice is done.

For what this would do would be to require that the courts in all cases brought before them become experts in the issues themselves, review and weigh all the evidence on both sides, and reach an independent conclusion as to the facts.

Obviously, this would impose a tremendous burden on already overburdened courts. Proceedings would be greatly extended, the course of litigation would be greatly increased. The unscrupulous, who are always eager to make money, even out of dangerous products, might bring case after case into court, tying up the Commission and the courts in endless litigation. What a device this would be in the hands of those whom we know would be ready to exploit it to the full.

The highly specialized functions of the Commission, which has served the public well and long, would be transferred, under H. R. 2390, to the courts, and the Commission would become merely a collector of evidence.

If the procedure proposed by the bill is warranted in the case of the Federal Trade Commission, which we contend it is not, then it is equally appropriate to all other quasijudicial bodies. Can anyone imagine how our justices, able as they are, could become experts as to the facts in fields as diverse as trade practices, national labor relations, communications, and interstate commerce, to mention but a

few? Can one conceive of the difficulties and delays that would result? Could one expect that the essential public protection the Federal Trade Commission now affords would be strengthened? We feel that justice would not be served; it is well served now. The proposed change is not only unnecessary; in our view, it is a threat to practice long tried and long proven in the public interest.

The American Association of University Women must conclude that the provisions of H. R. 2390 would deprive the consumer of necessary safeguards the law now affords. We urge that the bill be voted down with the least possible delay.

Mr. SADOWSKI. Thank you.

Mr. REECE. May I ask if you are a member of the bar?

Mrs. KEYSERLING. No, I am not.

Mr. REECE. A good portion of your statement dealt with the court review provisions of the bill, and I was wondering if you had advised with some member of the bar in connection with that.

Mrs. KEYSERLING. No, sir; I have not. I am an economist but not a lawyer.

Mr. O'HARA. Just one or two other questions: In your comments upon the drug and cosmetic angle, particularly with regard to the matter of drugs, would you suggest that the law should be that every person who wants to buy headache tablets or something of that type should only do so by prescription of a physician?

Mrs. KEYSERLING. I feel that in the case of drugs not potentially harmful, or injurious, the consumer should be free, as he is at present, to purchase as he chooses.

Mr. O'HARA. Do you think the average purchaser of the average drug which he can buy without prescription reads the directions and labels upon the drug?

Mrs. KEYSERLING. I am afraid not—I am afraid very few do.

Mr. O'HARA. I am afraid so, too.

Mrs. KEYSERLING. So that the advertising which leads him to learn of the product is, in our minds, a very important place for him to get the information he should have.

Mr. O'HARA. How much do you think he would read the advertising?

Mrs. KEYSERLING. I think people read a good deal more than one sometimes thinks.

Mr. O'HARA. Well, in your comments upon the legal end of it, do you know how long it takes an appeal to go from the Federal Trade Commission to the Circuit Court of Appeals to be argued, generally, as to what the limitation is?

Mrs. KEYSERLING. I do not know what that limitation is.

Mr. O'HARA. Do you have any idea how long it takes some of the cases to be tried in the Federal Trade Commission?

Mrs. KEYSERLING. No, I have not analyzed that record.

Mr. O'HARA. That is all.

Mr. REECE. Just in that regard, of course primarily responsibility for protecting the public from injurious drugs rests with the Food and Drug Administration, which I think you will agree has done a very good job in administering that provision of the law.

That responsibility was given the Food and Drug Administration because it had the technical and laboratory facilities and the staff to enable it to determine the therapeutic value of drugs.

Then in order to enable the Food and Drug Administration to move rapidly in protecting the public, where an injurious drug appeared on the market, it was given power to seize the injurious drug and immediately remove it from sale and likewise move directly in the Federal court by direct action, both in connection with the seizure and also in a criminal prosecution where the law had been violated, and likewise go immediately into the Federal court and get an injunction to enjoin any violation of the law.

Now, Dr. Dunbar in his letter with reference to this bill called attention to the fact that the Federal Trade Commission's chief course of action to protect the public lay in obtaining a cease and desist order, which usually follows a long investigation and development, as has been referred to by the witnesses with respect to the Federal Trade Commission.

Then that is subject to legal procedure of different types. Dr. Dunbar points out instances where the limitation over a cease-and-desist order has continued for as high as 2 years, during which time the injurious drug could be sold and would continue to be sold.

Now, what would your idea about any additional power which the Food and Drug Administration might need, giving all that power to the Food and Drug Administration so as to enable it to move directly on every phase of the distribution of a product so as to enable it to rapidly protect the interests of the public without waiting for long legal proceedings such as obtains in the case of a cease-and-desist order?

Mrs. KEYSERLING. We feel that the powers of the Food and Drug Administration are exceedingly important and have been very effective in protecting the consumer from the sort of products that you mention.

However, we feel that there is a different function, different in emphasis, having to do with the advertising of a commodity, which the Federal Trade Commission has exercised under the present law.

We feel that the consumer is informed of many of these potentially harmful products through advertising, and therefore would regret it if the present law which makes it necessary for an advertisement to indicate potential dangers were limited.

We feel that it is important that that power not be limited. It is quite a different power from that which the Food and Drug Administration exercises.

Then, to comment on another aspect of what you have just said. Now, as to delays in proceeding: As we have reviewed the record we have been very much impressed by the fact that although the Federal Trade Commission receives thousands of complaints, a very large proportion of the practices which violate the law have been altered on a voluntary basis without the institution of legal proceedings.

As we have looked at the record we have found that a very small proportion of the cases actually have had to go into the courts, and we feel that that is something which should very definitely be borne in mind.

It is to us an impressive record.

Mr. REECE. Have the Commission or members of the staff advised with you with regard to your statement?

Mrs. KEYSERLING. No, in no way.

Mr. ROGERS. Just one question: I would like to know your interpretation and also the grounds of your opposition to this sentence contained in the bill:

The findings of the Commission as to the facts, if supported by the preponderance of the evidence, shall be conclusive.

Now, just what is your interpretation of that sentence, and what is your counter-proposition to it?

Mrs. KEYSERLING. May I ask where that appears?

Mr. ROGERS. That is at the bottom of page 2, beginning at 22.

Mrs. KEYSERLING. Yes. I think, sir, I have spoken to that in my statement. We feel that this introduces a very significant change in the law at the present time.

At the present time the law reads that the findings of the Commission as to the facts if supported by the evidence shall be conclusive.

To change this, to bring in "if supported by the preponderance of the evidence, shall be conclusive" seems to us to alter the entire function of the Commission and the entire function of the courts in relation to this matter. This change would mean that the courts would have to review the evidence on both sides, all of the evidence, to review and weigh all the facts themselves, and substitute, in our judgment, their judgment as to the facts for the judgment of the Commission experts.

If a change of this type is justified here, it would be equally warranted for all the other quasi-judicial agencies of the Government, and you would be throwing into the courts an immense amount of work to determine, weigh, and judge all the facts in the widest range of cases.

You would be compelling the justices to become experts in this enormously complicated range of business. We feel that it would tremendously increase the burden of work in the court; it would induce a great many people to bring cases into court who are now not so doing.

We feel that expense of litigation would be vastly increased; that justice would be much slower than it is at the present time. The very important services which the Commission is now rendering would, we believe, be lost to the Government.

Mr. ROGERS. In other words, you think that the courts' duties would be expanded enormously if this were introduced?

Mrs. KEYSERLING. Yes, I am sure.

Mr. O'HARA. On the question of expertness, what qualification is required of a Commissioner on the Federal Trade Commission that is not required of a Federal judge?

Mrs. KEYSERLING. He is, I presume, and I am very confident is, an expert in this specific Government field. Whereas the justice's territory would have to cover a tremendously wide field if he were called upon to review and weigh all the facts, not only in a field such as this but in all of the other fields that would come before him if similar changes were made in the law with regard to other quasi-judicial functions.

Mr. O'HARA. Then your view would be that a Federal circuit court of appeals would not be qualified to pass on any question of appeal and therefore there should not be any appeal? Is that right?

Mrs. KEYSERLING. Not at all.

Mr. O'HARA. Do you not have that same situation today, that Federal circuit judges are required to pass upon this so-called "expertness" qualification on an appeal under the present law?

Mrs. KEYSERLING. Is it not true that the justices now determine whether the decisions have been arbitrary and unreasonable and whether there is substantial evidence confirming the position which the agency has taken?

Now, that seems to me a very different matter and one which would require a different type of qualification from weighing the entire record.

Mr. O'HARA. Well, they pass upon the same facts and the same law, do they not? Under either rule they pass upon the same facts and the same law?

Mrs. KEYSERLING. I think you are correct that it is a matter of degree, but it seems to me that the issue of degree is a very fundamental and important one.

Mr. O'HARA. But are we not going around in circles if we say that we change this rule from a substantial rule to the preponderance rule, that it is going to overburden the courts and the courts are not capable of handling it?

Mrs. KEYSERLING. As I have indicated before, I am not a lawyer. My field is economics. I have discussed this matter with many able lawyers of my acquaintance.

I was formerly general secretary of the National Consumers League, and we were concerned with similar problems in other fields at the time.

The position which I have indicated has been based on my thinking which has been developed since that time.

Mr. O'HARA. Do you not think that the people who are involved in these proceedings have substantial rights under the Constitution which they should have determined in a sound, constitutional way?

Mrs. KEYSERLING. I do indeed, and I feel that the present procedure more than adequately meets that standard.

Mr. O'HARA. Thank you.

Mr. SADOWSKI. Is Mr. Griffith here? If not, then the next witness is Mr. Benjamin Marsh.

Will you state your name and organization you represent?

Mr. MARSH. Benjamin C. Marsh. I am executive secretary of the Peoples Lobby, with headquarters here in Washington.

The address is 810 F Street NW.

STATEMENT OF BENJAMIN C. MARSH, REPRESENTING THE PEOPLES LOBBY

Mr. MARSH. Mr. Chairman and members of the committee, I sent a letter to the chairman asking that it be incorporated in the hearing in opposition to this bill, and I want to repeat that and ask that it be placed in the record.

I hesitate to take more than a few minutes this morning since Judge Davis and others of the Commission who know the details are here, but I would like to point this out: I have been here about 28 years, or a little over, in Washington, watching legislative procedure, and

I realize that some of the questions by the members of the committee this morning to the preceding witness emphasized that we have to limit the extent to which courts are able to upset decisions reached by administrative bodies such as the Federal Trade Commission, which, let me note, was constitutionally created by act of Congress.

Now, you simply cannot burden the courts with details. Frankly, I think that this is an indirect method, this bill, or an attempt rather, to paralyze the Federal Trade Commission.

That may not be the intent of the introducer. But if you are going to have to appeal and appeal and appeal, you are simply going to stymie action, and the consumers do not want it.

Let me give a little illustration. I think it was around 1924 or 1925 that there was a marked reduction in the appropriation for the Federal Trade Commission.

Well, I had followed that Commission's work ever since I came here in 1910, and I wrote Members of Congress. I was then with the Farmers National Council and similar organizations, that that was an attempt to put out the eyes of Uncle Sam.

I gave that story to the press. Well, that appropriation was restored. I think it is a very unwise move and a very foolish political move to try to paralyze the Federal Trade Commission, which has a long record of very effective work.

Of course, they need more appropriations, and I assume that they could render their decisions and issue their orders to cease and desist much more rapidly if they had adequate appropriation, but I hope that this committee will not be a party, and I am pretty sure the Congress will not be a party to any effort to—well, I am to repeat, to paralyze and render inoperative in large measure the very effective work which the Federal Trade Commission has done.

I think it would be a very poor campaign slogan.

MR. SADOWSKI. Is that all?

MR. MARSH. It is enough. Shall I file a carbon copy of my letter with the clerk?

MR. SADOWSKI. Yes.

MR. REECE. I have a letter here from Mr. Griffith, together with a copy of resolution by the New York Board of Trade.

MR. SADOWSKI. We will be glad to insert that in the record at this point, and if he has any further statement to make it can follow at this point in the record.

(The statement is as follows:)

NEW YORK BOARD OF TRADE, INC.,
New York 7, N. Y., January 31, 1946.

Re H. R. 2390.

HON. CARROLL REECE,

House of Representatives, Washington, D. C.

DEAR CONGRESSMAN REECE: The New York Board of Trade, by unanimous vote of its board of directors, in whom authority is vested, adopted the enclosed resolution in support of H. R. 2390.

It would be deeply appreciated if this could be inserted in the record of the hearing on this bill.

I wish to reiterate the telegram sent to you that we regret deeply that we were unable to be present at the hearing on January 29. It is my understanding, however, that the hearings may be continued next week. If so, may we respectfully petition for the opportunity of being heard.

Very truly yours,

M. D. GRIFFITH,
Executive Vice President.

RESOLUTION

Support the Reece bill, H. R. 2390

Be it resolved, That the New York Board of Trade by this action of its directors endorse H. R. 2390, designed to amend the Federal Trade Commission Act. This board does not believe that there should be combined in any administrative agency of government the combined responsibilities and authority of investigator, prosecutor, judge, and jury. This board believes in the right of proper appeal to the duly constituted courts, which is a separate and distinct agency of our Government; and be it further

Resolved, That this opinion be sent to the President of the United States and to the appropriate committees of Congress.

MR. REECE. And in that same connection, authority was previously given, and I have here a statement by Charles Wesley Dunn.

MR. SADOWSKI. This ought to follow then, after the witnesses who appeared at the first part of the hearing.

Our next witness is Mr. Nathan B. Williams.

MR. WILLIAMS. If the chairman please, I am in favor of the bill, and prefer to be heard after the other side is concluded.

MR. SADOWSKI. All right.

Well, Judge, it looks as though we have completed our list of witnesses, and we will hear you next.

STATEMENT OF HON. EDWIN L. DAVIS, MEMBER, FEDERAL TRADE COMMISSION

MR. DAVIS. Mr. Chairman and gentlemen, I wish first to refer to some questions which have been asked this morning, before I enter upon my regular statement.

MR. REECE. Before the judge begins, if I may, I would like to make inquiry as to whether you in the views which you contemplate expressing, speak for the other members of the Commission.

MR. DAVIS. How was that?

MR. REECE. Do you speak for the other members of the Commission in the views that you contemplate expressing?

MR. DAVIS. I was authorized by the full Commission to appear and speak for the Commission and to supervise the presentation on behalf of the Commission.

Now, Mr. Chairman, first with respect to the relative functions of the Commission and the courts, that goes back to the administrative process.

Practically every civilized country in the world—all the leading ones at least—like England, France, Germany, the United States, and various others, and some of them even before the United States, gradually drifted into the adoption of the administrative process; and regardless of what some of us may believe, I think it is generally agreed by students of government that these administrative commissions are here to stay.

Because they grew out of necessity. In this complex age, when we have such a tremendous amount of problems, which vitally involve and affect the public interest, the Congress conceived that it was necessary to set up some tribunals to protect the public interest.

Now, most of what has been said here, especially by the proponents, related to protecting certain business interests. But the Federal Trade Commission and these other commissions were created by Congress for the specific purpose of protecting the public interest.

Now, with respect to false advertising, fraudulent methods and devices, and innumerable other things affecting not only the public health but affecting the pocketbook of all of our citizens, and yet ordinarily not affecting any one of them as distinguished from thousands of others, you could not expect these various individual citizens to go into the courts and prosecute for those offenses, and until Congress passed these acts, there were very few offenses upon which such a proceeding could be based.

Suppose they went to a district attorney. He would say, "Well, you will have to develop and bring to me all the facts and the analyses and the various other things, scientific and otherwise, involved; which, of course, would be an impossibility.

Consequently, the Federal Trade Commission and the other quasi-judicial commissions are created for the purpose of protecting the public, and are supplemental to the courts, and perform a service which in the very nature of things the courts could not perform.

Now, the question of expertness—I do not like to speak about myself, four of the present members of the Federal Trade Commission have been on the Commission from 11 to 17 years, and one who died a few months ago, Colonel March, was on the Commission 17 years, and was succeeded by Commissioner Mason.

During that time they have heard and studied and disposed of thousands of cases. Right in that connection, as the personnel of the Commission seems to have been brought into question, I want to take the liberty of handing you, if I may, some biographical sketches of the different members of the Commission.

Mr. REECE. Mr. Chairman, who brought the personnel of the Commission into question?

Mr. DAVIS. Well, I think the bill itself does. And there have undoubtedly been insinuations.

Mr. REECE. Well, I certainly disagree.

Mr. DAVIS. Yes; I say that there have been insinuations about the Commission in performing its duty and all that sort of thing.

Now, right along this line, I want you to examine the background and experience of the men on the Commission in order to determine whether you think they were disregarding of the interests of the people with whom they have been dealing, and so forth.

I submit that for what it is worth.

Mr. REECE. But, Mr. Chairman, I want to add, so far as I am concerned, I have not in any way intended to disparage the Commission's qualifications or manner of performance of their duties; and I think the impression which you seek to convey, Judge, is unfortunate to say the least.

Mr. DAVIS. Well, I want to say this: That in view of the fact that there are numerous commissions of a quasi-judicial nature, who are performing in substantially the same way in their fields as the Federal Trade Commission, and when there is a bill pending in Congress which has been under careful study for 4 or 5 years, undertaking to define the operation of all judicial commissions, which has been reported out to the Senate, the mere fact that the Federal Trade Commission alone has been singled out to reform and weaken, I say that fact alone is a reflection on the Commission and I so take it.

I know the other members do, too. But then, that is neither here nor there.

Mr. REECE. Then, Judge, any bill which may be introduced affecting the functions of the Federal Trade Commission is a reflection upon the members of the Commission?

Mr. DAVIS. No; I did not say that. I did not say that. I do not think that the McCarran-Sumners bill is. That undertakes to deal with all the quasi-judicial commissions, although with respect to some of the first bills they excepted the Federal Trade Commission. But the present bill does not.

Mr. REECE. Now, Judge, as to the statement you made a moment ago analyzing your theory of government that as government becomes more complex it is necessary to set up administrative agencies to protect the public, I recognize that it has become increasingly necessary to do so.

This bill does not seek to change that tendency, but it does, recognizing that increased powers of necessity must be given the bureaus and agencies, recognize the necessity of giving to the courts the power of making an adequate review of the decisions of such agencies; with the view, as one of your witnesses expressed so well the other day, of making sure that we are under the law and not under arbitrary action.

The whole tendency, as you said, of all great governments is to go toward government by administrative action.

That was particularly true in Germany and in Italy and in Russia, where the whole government was administered by administrative action and not by law.

That is what we want to avoid in this country: To live under law and not by arbitrary action.

Mr. DAVIS. Now, Mr. Chairman, it is 11 o'clock. I would like to present my views without interruption. When I get through I will stay just as long as Mr. Reece wants to debate the question, before the full committee or anywhere else.

But I cannot get my statement in if I do not have an opportunity to talk. I am not going to be able to say nearly as much as I would like to say anyhow, because, as I understand, it has been decided to close the hearings today.

We are only replying to things which are said about the Commission. We think we should have the full opportunity and right to do that, and I cannot possibly answer all of the innumerable things that have been injected into this record in an hour's time, or in a day's time for that matter.

But I would like to have an opportunity to say some of them uninterrupted. When I get through, I will be glad to appear any time anywhere, before this subcommittee or the full committee, and debate the question, with Mr. Reece, or answer all the questions that he may desire to put.

But I would like to get in some answers to the innumerable things, many of which are absolutely untrue, that have been injected into this record.

Mr. SADOWSKI. I think the witness is entitled to make his statement, and this committee has always been most fair in that respect.

We are proud of our record as a committee in permitting witnesses to present their statements without being harassed and bothered too much.

Mr. REECE. Well now, if asking a question for the purpose of developing information constitutes harassment of the witness, I misunderstand procedure.

The purpose of the hearing is to develop information which might be helpful to the committee in reaching a conclusion.

I am sure the Judge would not mind questions occasionally in order to bring out information which might be helpful.

Mr. DAVIS. I am not at all afraid of your questions, if I have the time. Not that I expect to convince you, Congressman Reece; I would be perfectly willing, but here we are right down to the last day, and I have held back to go on the stand to pick up the odds and ends of things that had not been covered, and I would like to have some privilege in that respect.

Mr. REECE. One thing, Mr. Chairman, that I had in mind asking the Judge early in his statement is to give us the procedure that is followed in the Commission leading up to the issuance of a complaint and the trial of the case.

Mr. DAVIS. Now, I already had that in mind. That is a part of my statement.

Mr. REECE. For instance, how many different departments of the Commission—

Mr. DAVIS. And I will answer anything you want to ask about if you just give me a chance.

Mr. REECE. For instance, how many different departments of the Commission function on a case before a complaint is issued? And does the Commission itself have anything to do with the issuance of the complaint?

Those go to the procedure of the Commission, and those are some of the questions that I want to ask as we go along.

Mr. SADOWSKI. The Judge has said that he will answer that question, Mr. Reece, and under the rules of the committee when the witness makes a request to make his statement without interruption, it is the policy of the committee to grant that request.

We shall follow that in this instance.

Mr. O'HARA. Mr. Chairman, I would like to have the record show that I have no objection to the program as far as the witness is concerned, but I do object to your using the term "harass."

Mr. SADOWSKI. I will strike that. But I do think that when a witness makes a request to make his statement without interruption, his request should be granted; Judge, you may proceed with your statement.

Mr. DAVIS. Now, Mr. Chairman and gentlemen, on the question of appeal, these records are in many instances very voluminous, running into the thousands of pages.

They deal with things that courts are not accustomed to dealing with unless they get an appeal from the Federal Trade Commission or perhaps the Food and Drug Administration.

Some of those courts will not get a case from either of those oftener than every 2 or 3 or 4 years, and some oftener, and then when they get them it is primarily handled by one member of the court.

The New York circuit, the second circuit, and the seventh circuit, get cases much more frequently.

The Supreme Court has many times said that the Commission by reason of its long experience and study of these questions is better able to determine them than where a court gets one for the first time. But the question of appeal is no different than it is in many other instances.

For instance, an appeal from a jury by or from a master in chancery, or where the jury is waived, as it is in many States, in Mr. Reece's State and mine, it has the same force and effect as if there were a jury; that is, substantially the same as the substantial evidence rule.

Now, I want to, in the first place, explain that the Federal Trade Commission can impose no fine or penalty. Just remember that. The Federal Trade Commission can only in proper cases say, "Cease and desist."

In other words, stopping them from doing that. If they are not doing it, as sometimes they insist, it would not hurt them much to tell them to stop, if they are not doing anything.

If they are doing it and it is wrong, they ought to be stopped. Now, it is the mildest form of procedure in law, "Cease and desist", and I want to show you our procedure and show you how these cases are winnowed down.

You get down to a very few cases that all of this is about. All of this talk has resolved around a few cases out of tens of thousands. In other words, it is proposed to burn down the barn to kill a rat; or, I might say, a mouse.

Now, that is what is involved here. In the first place, if the Commission receives a complaint, it may be from a competitor; it may be from a consumer who claims to have been gypped; it may be from different departments of the Government, as it frequently is, our municipal governments, better business bureaus, chamber of commerce, all those; but the vast majority of complaints come from competitors who are complaining of the unfair practices of their competitors.

Now, when a complaint comes to the Commission, in the first place, section 5 of the act provides:

Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers—

and so forth—

from using unfair methods of competition in commerce and unfair and deceptive acts or practices in commerce.

Now, that is not only an authority but a direction from Congress, a specific direction, and that was in the original act, and then the Wheeler-Lea amendment to the act strengthened the law, because it greatly strengthened the authority of the Commission to deal with the advertising and sale of dangerous drugs, and so forth.

This bill is all directed at the Wheeler-Lea Act, which was passed after serious 4 or 5 years' study, about the same time Congress passed the amendment to the new Food and Drug Act, with the one exception about the question of preponderance of the evidence.

That was not considered then. No one raised the question then. Nobody else is raising the question. It is not raised or proposed in the McCarran-Sumners bill that is pending.

The preponderance of evidence on appeal was not recommended by the Attorney General's committee. As was already stated here, originally about 10 years ago, some bar association committee suggested it, but the American Bar Association has receded from it, and nobody, so far as I know, in high authority, is advocating it except in this bill.

Their first witness introduced here, Dean Stason, refused to go along on the bill. He said he was not for preponderance of the evidence on appeal and was not for a de novo trial on appeal, and other things along that line.

He was introduced by the proponents. Now, going on with this procedure:

Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least 30 days after the service of said complaint.

Then the act provides that they have 30 days within which to answer, and then it is assigned to a trial examiner, after the issues are joined.

When the Commission receives a complaint from a citizen which appears to be an alleged violation of the law, involving interstate commerce, and so forth, it is referred to the Chief Examiner, who is Chief of the Field Investigational Division of the Commission.

He assigns the matter to an attorney examiner to make an investigation, and among other things he is directed to always visit the respondent himself, or if it is a corporation, one of their officials; explain to him what the charge is and ask him if he has anything to say. He is not compelled to say anything but is always given the privilege of doing it.

Reports of all interviews are written up daily, first on the daily report, and finally the field examiner writes up his report on the whole investigation, also stating his conclusions and recommendation; the record is gone over by the Chief Examiner, and he writes his report. He may recommend that it be dismissed or closed. He may recommend corrective action.

Now, with certain exceptions, monopolistic fixing of prices, and so forth; in other words, a violation of the Sherman law or the Clayton Act, or unless a person is an old offender who has been up from time to time before, the Commission, if it decides from this record, the written record of the investigation, that it may probably be a violation of the law, and the Commission decides to grant the privilege of stipulation, they refer it to the chief trial examiner, who will proceed to negotiate a stipulation, in which the respondent admits whatever facts he is willing to admit, admits the advertising, admits that it is false, and agrees to cease and desist from engaging in certain specified acts, and not to resume same.

Now, if it is settled that way, all well and good. The respondent may decline to stipulate, and he is never forced, and we never permit him to sign a stipulation if he says, "I will sign it but it is not correct."

We will not accept that. The respondent has to sign it willingly and in good faith. But if he does not sign, then it goes to the chief counsel for him to have one of his men prepare a complaint and have it served.

MR. REECE. But does the Commission consider and pass upon the complaint before it is issued, or is that a function of the chief counsel's office? That is an important question to which I wanted to get a response, Judge.

MR. DAVIS. He drafts the complaint. But if the Commission, under the law, we will say, has reason to believe that the law has been violated and that a proceeding would be in the public interest, the law says that it shall direct complaint.

The Commission does that under those conditions.

MR. REECE. I am familiar with that provision of the law and I had that in mind when I propounded the question. But as a matter of procedure, does the Commission approve the complaint, and is it issued at the instance of the Commission?

MR. DAVIS. Well, the Commission directs the complaint under those conditions, and generally speaking, the Commission does not see it.

MR. REECE. The Commission may or may not see it?

MR. DAVIS. Yes.

MR. REECE. Does it usually see it or not see it?

MR. DAVIS. I do not know about that.

MR. REECE. Well, you have a procedure which I presume is followed, and what I am trying to develop now is what is the procedure.

MR. DAVIS. It does not necessarily come back to the Commission.

MR. REECE. Sir?

MR. DAVIS. No; it does not necessarily come back to the Commission after the complaint is drawn. The chief counsel has prepared the complaint, and he gives it to the secretary to have it served, and with proper notice. That is the customary procedure.

MR. KELLEY. It is like this: A case goes to the Commission from the Investigating Division. The Commission reviews the case and either dismisses it or directs complaint.

In the event a complaint is directed, before the complaint is served in all cases except certain cases involving the Clayton Act and price-fixing cases and palpable fraud, they allow the party the privilege of settling it by voluntary stipulation. But in the event that it is not settled in that way, it comes to my office to carry out the direction of the Commission in directing the complaint.

We draft the complaint embracing those charges within that direction and send it to the secretary for service, without it going back to the Commission again.

But if a case comes to me and I feel, as a matter of law, that the Commission was wrong in directing the complaint, I will send it back and tell them so; also, if I see in the file a charge that is different or one that does not embrace the one that they directed, then I will send it back to them notice about that.

MR. REECE. The purpose of my question is to ascertain if the Commission sits more or less as a committing magistrate in the issuance of a complaint.

MR. KELLEY. No; they review the case and either order a dismissal or a complaint, leaving out the stipulation, of course, so that they do not see it again.

My office drafts the complaint embodying that direction of the Commission.

Mr. REECE. But the Commission does consider the case in a preliminary way and determines if a complaint shall be issued?

Mr. KELLEY. It must, under the statute; yes. Under the statute only the Commission can direct the complaint.

Mr. REECE. I was familiar with that provision of the statute and I assumed that that was the case. This question, of course, is leading up to questions which I expect to propound later on; which go in the direction of the common suggestion that the Commission does sit as complainant, judge, and jury. I was laying the groundwork for development of the whole procedure.

Mr. KELLEY. I thought that was the purpose. There was an administrator at the review in the early stages of the administrative-procedure bills that thought that Congress ought to delegate the power to issue a complaint to persons in the agency other than the ones that decided the case.

Well, that is a matter that did not get very far, I do not think, with the Judiciary Committee on the Senate; but the point is that, as far as the Federal Trade Commission is concerned, it must direct the complaints itself because that is a mandate of the statute.

Mr. O'HARA. Mr. Kelley, in that connection, is it a pro forma matter or do the Commissioners actually—or do the attorneys from your office present to the Commission formally any record made of the fact that the Commission passed upon it, so that there is a record of it in each case?

Mr. KELLEY. Oh, yes; there is a direction in writing in each case; and not only that, but a final report regarding the facts in the case. The point that was considered to be unlawful in violation of law also.

Mr. REECE. That is before the complaint?

Mr. KELLEY. Before the complaint issues; yes.

Mr. DAVIS. The Commission meets every morning and is in session generally until about half past 12, when we are not otherwise engaged, and we keep complete minutes of everything, with votes recorded, and all that.

Mr. REECE. Mr. Chairman, while we are diverted, and not by the way of a question but simply for a verification of the record, with reference to Dean Stason's testimony, I did not have his transcript immediately before me.

Now, the dean suggested, as I interpret his testimony, that with the adoption of the McCarran-Summers bill, and then if the procedure of the Federal Trade Commission should be changed in certain important respects, the purposes and objective of H. R. 2390 would be attained. But then, in response he outlined what the changes are that should be made in order to accomplish the objectives which the bill itself seeks, and then, toward the conclusion of the dean's testimony, Mr. Rabin asked him this question:

Doctor, when you gave us the language, you would suggest that the McCarran-Summers bill was adopted. Let us suppose it were not adopted. Are you satisfied with the phraseology of this bill, H. R. 2390?

Dean STASON. If it were not adopted and if the Commission did not effectuate the procedures in some other way, then I think the language of the bill has merit.

Mr. DAVIS. Well, I know that he was examined and an effort made to get him to make a stronger statement, but the fact is on page 14, in response to a question, he says: "No; I do not agree that a trial de novo is the solution."

And he says on page 18 that Reece bill would give a trial de novo.

He also said that he did not think that the preponderance of the evidence was a proper rule. Then on pages 33, 34, and 35, he explains his objections to de novo trial on appeal.

Mr. SADOWSKI. Proceed with your statement, Judge.

Mr. DAVIS. Now, gentlemen, of course, every time I have to get back to what I was discussing—the procedure of a case before the Commission.

Now, we will take up the question of stipulations. Mr. Horton is the chief examiner, and I have a statement here which he prepared the other day, in which he says:

In normal times this office receives a large number of applications for complaint relating to the various laws administered by the Commission. Naturally, by a careful process of study and sifting, many of these applications are disposed of without further investigation or corrective action on the part of the Commission. It is estimated that from 750 to 1,000 such matters are handled each year, which are disposed of without further Commission action for numerous reasons, such as lack of jurisdiction, lack of public interest, private controversy, and so forth. All these matters require study and consideration.

Now, those cases are not even docketed. In his division, he says they average about 750 or 1,000 a year, where complaints are received and disposed of—dismissed or closed.

Following that up, I am taking this from the annual report: The total disposition during the year was 644—that is, leaving out that 750 or 1,000 which are not docketed and upon which he makes no report to the Commission. Those which went to complaint were 142. Those settled by stipulation, were 248; closed, 247.

Mr. O'HARA. Was that the report for the last current year, Judge? You did not refer to what year it was.

Mr. DAVIS. Yes, sir; this is '45. I have both here, as far as that is concerned. That was '45, and here is '44. The total disposition during the year, of the cases from the chief examiner's division, were 735; to complaint, 173; settled by stipulation, 271; total, 444; closed, 281; consolidated, 10.

Now, I say all these figures are smaller than they were prewar, because we have lost about a fourth of our staff to the armed forces. The number of our cases that we are handling are naturally not as much as they were before.

Mr. REECE. Only those cases that go to trial would be eligible for appeal?

Mr. DAVIS. Yes.

Mr. REECE. Under 2.390?

Mr. DAVIS. Yes. Those were by years. Now, here are reports from the acting chief trial examiner, in which he reports that since the enactment of the Wheeler-Lea amendment to the Federal Trade Commission Act, March 21, 1938, on up to February 21, 1946, the number of stipulations prepared in their division was 2,698, and the number of those executed by the respondents were 1,964, and those not executed were 734.

On other words, 72 $\frac{8}{10}$ percent of those that were offered the privilege of settling a case by stipulation did so and signed the stipulation admitting the facts, and in other words admitting liability and agreeing to cease and desist and not resume the practices.

We have a Radio and Periodical Division which reviews advertising, both in periodicals and over the radio, and I have a chart here which I will give each of the members of the committee, and also the reporter, please, and request that it be inserted in the record.

I would like for you to see how these matters are gone over and how they are winnowed down to a relatively few cases. During 1944, in which they handled more than they did the next year, because they lost just about half of them in that Division, being mostly young lawyers who went to war: Advertising surveyed; newspapers, 1,792 issues; magazines, 967 issues; and they read 298,970 ads.

The next column shows the number of those marked for further consideration. Out of the 298,970 there were marked for consideration, 21,781.

Then the chart gives the figures on almanacs, mail-order catalogs, and radio continuities; in other words, radio advertisements. They call them continuities, but they are radio advertisements. You see, during that year they read 1,527,500 pages of radio advertisements. By the way, the broadcasters are all very cooperative, and they furnish us these advertisements.

Now, out of the 1,527,500 pages read, they marked for further consideration 19,512, which, as you see, is a very small percent. The total commodities involved in all that survey amounted to 1,902.

Then they winnow this all down to 299 for final investigation. There were 299 investigations instituted. Then they sent a questionnaire to the ones that they finally marked for investigation, asking various questions, as to the formula, and various other things.

If you go still further, 27 resulted in complaint. That is 9 percent out of the 299 finally marked for further investigation; 113 were settled by stipulation, and 159 were closed or otherwise disposed of.

Mr. O'HARA. Would you mind my asking you the difference between the complaints issued and those settled by stipulation and closed or otherwise? Some of us are not familiar with that.

Mr. DAVIS. Well, of course, if a case is stipulated, that is just like you might say an admission answer. They plead guilty and agree to cease and desist, which is all that you could do if you went through a trial.

Mr. O'HARA. I see.

Mr. DAVIS. And with respect to matters closed or otherwise disposed of, that represents cases which upon further investigation it develops that they were either not engaged in interstate commerce, that it was too trivial to give further consideration to, that it was simply a private controversy, or for various other reasons we would just close it.

Mr. O'HARA. Judge, could I ask just a question there, so that we can dispose of it: When it is settled by stipulation, does that mean a complaint was issued?

Mr. DAVIS. No.

Mr. O'HARA. That is just merely upon the investigation of the charges made?

RADIO AND PERIODICAL DIVISION

FISCAL YEAR ENDING 1944

ADVERTISING SURVEYED

Newspapers, 1792 issues }
Magazines, 967 issues }

Almanacs:

Mail Order Catalogs

Radio Continuities

298,970 ads--

1,304 pp.--

8,603 pp.--

1,527,500 pp.--

ADS MARKED FOR FURTHER CONSIDERATION

21,781--

Total

211-- Commodities

Involved,

358--

19,512--

299

INVESTIGATIONS
INSTITUTED

27 COMPLAINTS
ISSUED. 9%

113 SETTLED BY 37%
STIPULATION.

159 CLOSED OR OTHER-
WISE DISPOSED
OP. 54%

FISCAL YEAR ENDING 1945

ADVERTISING SURVEYED

Newspapers, 1430 issues }
Magazines, 765 issues }

Mail Order Catalogs

Radio Continuities

286,744 ads--

14,361 pp.--

1,334,584 pp.--

ADS MARKED FOR FURTHER CONSIDERATION

16,551--

Total

709-- Commodities

Involved,

1114

10,571--

200

INVESTIGATIONS
INSTITUTED

16 COMPLAINTS 8 %
ISSUED.

56 SETTLED BY 28%
STIPULATION.

128 CLOSED OR OTHER-
WISE DISPOSED
OP. 64%

W. H. Davis
Director

Mr. DAVIS. They are given notice. No; where they are settled by stipulation we do not issue a complaint. In other words, all the way through we are doing just as little as we can that will effect the ends of the law.

So when they stipulate, there is no complaint issued. Now, for instance, out of 298,970 newspaper and magazine advertisements and 1,537,407 pages of almanacs, mail-order catalogs, and radio continuities which were read, that culminated in 27 complaints and 113 settled by stipulation.

Mr. SEAMAN. That is not mine; that is on the Senate side. On the Those were all that were gathered out of that tremendous amount of review of advertising.

Mr. REECE. Then, Judge, if you do not mind, out of the something less than 2,000,000 ads or 299 investigations, how many of those cases would have been eligible for appeal to the court, even if 2,390 should be adopted? Only those cases in which complaints were issued were the cases tried?

Mr. DAVIS. Yes; those are the only ones. They do not appeal from a stipulation, because they have made admission. There would only be 27 of them as to which there might be an appeal.

In some of these there were not and in some of these there were.

Now, the next figure is given for the next year.

Mr. O'HARA. Judge, could I ask you one other question in reference to that same line? Of the 27 in which complaints were issued have they been disposed of? The chart here does not show. I suppose that you have no way of knowing?

Mr. DAVIS. Now, I can follow that up here. You have the figures of these particular 27 complaints, because those went to trial, just like those from the chief examiner's division in which they refused to stipulate.

Mr. KELLEY. This stipulation procedure seems to be a little confusing. As a matter of fact, it is just a voluntary method of getting a settlement between the other party and the Commission down on paper. It is not binding. If they violate that stipulation, you cannot proceed against them for violating the stipulation. You have to issue a complaint on the charges. It has no legal effect at all. It is good faith, moral obligation.

Mr. DAVIS. Now, notwithstanding this large amount of cases that are settled by stipulation, in which the parties come in and make the admission and say, "Yes, I have been using that advertising." I use the word "advertising." All cases are not advertising cases, but that is a simple example. They say, "Yes, I have been using that advertising, and that is false and misleading, and I agree to cease and desist from using it and not resume it in the future."

Yet, if this bill passes, a great number of those, although admitting that they are in the wrong, a great many of them would take their chances if they can get two trials, one before the Commission and one before the court, where in the very nature of things ordinarily the court cannot go into all the facts, and they would think that they have another chance there, and they would take their chance.

Now, Mr. Chairman and gentlemen, Chief Counsel Kelley has already presented the final culmination of cases since the enactment of the Wheeler-Lea bill. During that time there were 462 cases in which

complaint was issued, and he called attention to the fact that the number disposed of on admission answers—in other words, filing answer and admitting the charges of the complaint—was 180, or 39 percent.

Then, later on, other respondents agreed to the same thing after they had filed their answers. They came along then and agreed to a statement of facts, which was tantamount to the same thing. That was 21 percent; 97, or 21 percent. The number disposed of on admission answers and stipulations as to the facts was 277, or 60 percent. Now, after all this has been winnowed down, and after thousands had been settled by stipulation, after these still greater thousands were first cast aside, and after they first show fight but then file admission answers or stipulations agreeing that the facts are as stated in the complaint, 60 percent of them, then the number disposed of by trial is 185.

The number disposed of by trial which were not appealed were 141, or 76 percent; that is, of those actually tried. The number appealed to the circuit court of appeals were 43. The number petitioning for review were 34; number modified, 7; number reversed, 2; number of formal complaints dismissed or closed, 58.

Now, with respect to the suggestion of the Commission directing the complaints, we do, because the statute says that, when we have reason to believe, and so forth. But I want to call your attention to the fact, with respect to the insinuation of some of the witnesses, and the constant talk about being prosecutor, judge, and jury, that the Commission is not out to get anybody, and so far as I have observed in my 13 years on the Commission, I have never seen any indication to my mind that any member of the Commission voted as he did in order to get even with somebody.

I have never seen the slightest indication, and so far as I am concerned so help me God, I never have. I want to say furthermore, as a member of the Commission for 13 years, that I never have decided a case, voted for a cease and desist order, unless I honestly believed it was supported by a preponderance or greater weight of the testimony.

I am sure that every other Commissioner can say the same thing, because I know we sit around the table and we discuss it time after time.

It is our purpose, or desire, to determine it so far as we are concerned according to, I think, greater weight of the evidence, as distinguished from preponderance, but either way you put it; we have no interest except to do our sworn duty to do what Congress has directed us to do.

As far as I know, I have never known of any instance where any of these critical attorneys have ever charged the contrary in any specific instance.

Now, here is another matter that is right along that line. After the Commission had directed corrective action in 462 cases—I think if you will study these figures you will see that they are very illuminating; 277, or 60 percent, were settled by their own admissions of the correctness of the charges in the complaint, and then of the remaining cases 58, or more than 10 percent of the cases, were dismissed by the Commission after they had ordered complaint.

Now, furthermore, the Commission does not direct the complaint upon what might be termed a *prima facie* case, for instance, as is done by a grand jury. The Commission does not direct a complaint

unless it appears on the surface from the investigation and in the light of what it has before it, that there is a violation of law there, and that a complaint is justified as well as authorized.

Those are the facts. We know that we are not going to get anywhere unless the facts develop a case. In other words, there is nothing to be gained from our standpoint or the public standpoint just to be issuing a complaint, and we do not do it unless we believe that the facts that have already been investigated will stand up.

Mr. REECE. But that being the case, is the Commission left entirely in an unbiased position?

Mr. DAVIS. Yes; because whenever they overturn it on the trial, the Commission, just as this shows here and just as Mr. Horton's report shows, does not hesitate to dismiss the case.

We do it in a substantial number of cases all the time. Even after a case is tried, or sometimes in the course of trial, the Commission will dismiss a case, and, as I said, of these here there have been over 10 percent after it has gone to trial.

All that we do is to carry out in good faith what the statutes say. We undertake to do that, and then if upon trial of the case the respondent overturns the preponderance, we dismiss it.

Mr. REECE. Now, in what way would the enactment of H. R. 2390 change the procedure up to the point which you have now discussed?

Mr. DAVIS. Well, I do not know. Of course, that is related to the consideration on appeal that you are talking about.

Mr. REECE. But that has not yet come up for consideration in the course of your procedure?

Mr. DAVIS. No; I am not through discussing this.

Mr. REECE. But up to the point that you are now discussing would the enactment of H. R. 2390 effect any change in the procedure which you have described?

Mr. DAVIS. Well, just on first blush, I do not recall that it would. I do not know without studying the matter a little. But now here, gentlemen, suppose that a case goes to trial.

Mr. REECE. Well, it obviously would not, Judge. There is no reason for holding back, as I see it, in response to a question of that kind.

Mr. DAVIS. Well, if it is obviously so, let it go at that.

Mr. REECE. It is obvious to me. I am just wondering if it is obvious to you. It does not seem to be altogether obvious to you but it did seem obvious to me, and I was wondering if I might be in error in my view on it.

Mr. DAVIS. It is difficult to get your mind off of what you are trying to say to the committee and get it off on something else.

Now, I want to tell you, as I was on the verge of saying: We will suppose that a case goes to trial. The complaint is filed. The respondents file their answer. Then it is referred to a trial examiner to receive evidence first introduced by the attorney for the Commission, who has been assigned by the chief counsel to try the case, and then when he gets through introducing his evidence, the attorney for the respondent then introduces his evidence.

Now, the trial examiner before whom this evidence is taken has had absolutely nothing to do previously with the case. He is absolutely free, untrammelled, and unbiased. He sits there very much like a

master in chancery does sometimes and receives evidence, and the evidence is taken down *verbatim et literatim*, every word, every exception, and everything of the kind, by a wholly disinterested reporter.

The reporters are not employees of the Federal Trade Commission and never have been. We advertise, as most of the governmental agencies do, for bids to do our work for the ensuing year. We award the contract to the lowest bidder then, provided they are responsible. They are under oath, and they report the evidence, and that is the evidence that is used before the Commission, and the evidence that goes up to the circuit court of appeals.

Mr. REECE. How long are the records in those more voluminous cases? Someone stated, I believe, that they ran to 50,000 pages.

Mr. DAVIS. We had one of 50,000 pages.

Mr. REECE. Fifty thousand pages; yes.

Mr. DAVIS. Fifty thousand pages besides the exhibits. That involved the basing-point system.

Mr. REECE. Those records are typed. Do those records come up to the Commission, and are the records read by the Commission? How does the Commission consider the record?

Mr. DAVIS. Let me tell you: Going back a little, after the evidence is all concluded, sometimes the Commission reads all of it but sometimes we do not and cannot. For instance, we never read the 50,000 pages and thousands of exhibits in that case, which took 3 or 4 years to try. But I will explain to you what we did do and tell you how the procedure took place.

After all that evidence was concluded, then the trial examiner had to write his report on the facts.

Mr. SADOWSKI. Well, Judge, it is now 12 o'clock. If it will be all right with you, suppose we continue this after 2 o'clock this afternoon.

I see that we are going to get into quite an involved discussion here probably, and we might be able to do it better if we have a little lunch.

Mr. DAVIS. All right.

Mr. REECE. Mr. Chairman, before you adjourn, I was looking over a part of Mr. Cassidy's testimony in connection with which he filed copies of some complaints, which the Commission issued.

At the time the permission was given to make those complaints a part of the record, the committee likewise directed that copies of the stipulations which had previously been drawn up in those or comparable cases be inserted at the same point in the record.

As I understand, Mr. Cassidy did not have authority until he obtained it from the Commission, to bring them up, which I understand he now has, and I am now bringing this up so that they will be put in the record at the same point.

Mr. DAVIS. Those are all the records that he presented.

Mr. REECE. Sir?

Mr. DAVIS. You want all those made a part of the record?

Mr. O'HARA. Judge, I think the stipulations were what was referred to.

Mr. REECE. In each of those cases, as I understood, stipulations had been drawn up, and the Commission desired that copies of the stipulations also accompany the complaints which were issued in the cases.

That would be agreeable, would it not, Judge?

Mr. DAVIS. You want the complaints, then, too?

Mr. CASSEDY. The complaints were filed.

Mr. REECE. We have the complaints.

Mr. KELLEY. Those cases are in the course of trial. They are not completed. The Commission has formed no opinion at all, rendered no decision. In these cases, like in other cases, the trial will be completed and the trial examiner will write his report.

Exceptions will be filed. There will be briefs filed and oral argument. Then the Commission will take the cases under advisement and decide them on the record.

Mr. REECE. But the stipulations were drawn up and presented?

Mr. KELLEY. Prior to the issuance of complaint, yes.

Mr. REECE. So that those stipulations could be made a part of the record without doing any grievance?

Mr. KELLEY. Surely.

UNITED STATES OF AMERICA, BEFORE FEDERAL TRADE COMMISSION

File No. 1-14558

IN THE MATTER OF MILES LABORATORIES, INC., A CORPORATION

STIPULATION AS TO THE FACTS AND AGREEMENT TO CEASE AND DESIST

Pursuant to the provisions of the Federal Trade Commission Act (38 Stat. 717; as amended 52 Stat. 111, 15 U. S. C. A., Sec. 41), the Federal Trade Commission caused an investigation to be made of the methods, acts, and practices used by Miles Laboratories, Inc., a corporation, in commerce as defined by the Act, and from such investigation has reason to believe that the aforesaid corporation has been or is using unfair methods of competition and unfair and deceptive acts and practices in commerce in violation of the provisions of said Act.

It now appearing that Miles Laboratories, Inc., is willing to stipulate as to the facts and enter into an agreement to cease and desist from the use of the methods, acts, and practices as hereinbefore set forth in such agreement, and that the Federal Trade Commission may be willing to accept such stipulation and agreement to cease and desist without prejudice to its right to issue a complaint and institute formal proceedings against the said Miles Laboratories, Inc., if at any time the Commission shall deem that such action is warranted;

IT IS HEREBY STIPULATED by and between the Federal Trade Commission and Miles Laboratories, Inc., that the following is a true statement of the facts:

PARAGRAPH ONE: Miles Laboratories, Inc., is an Indiana corporation with its principal place of business in the city of Elkhart, state of Indiana. It is now and for some time past has been engaged in the sale and distribution in commerce between and among various states of the United States of medicinal preparations, including products designated "Dr. Miles' Nervine," "Dr. Miles' Nervine Tablets" and "Dr. Miles' Anti-Pain Pills"; causing such preparations, when sold, to be shipped from its place of business in the state of Indiana to purchasers in other states. At all times herein referred to, said corporation has been in competition with other corporations and with individuals, firms, and partnerships likewise engaged in the sale and distribution, in interstate commerce, of similar products.

PARAGRAPH TWO: In the course and conduct of its business as described in Paragraph One hereof, Miles Laboratories, Inc., in connection with the sale and distribution of its medicinal preparations in commerce as defined by the Federal Trade Commission Act, has disseminated or caused to be disseminated advertisements, by means of the United States mails or other means in commerce, as defined by the Federal Trade Commission Act, for the purpose of inducing or which were likely to induce, directly or indirectly, the purchase thereof; and has disseminated or caused to be disseminated advertisements by various means for the purpose of inducing or which were likely to induce, directly or indirectly, the purchase thereof in commerce as defined by the Federal Trade Commission Act. Certain advertisements, contained in a publication designated "Miles New Weather

Almanac and Hand Book of Valuable Information" and/or other publications having interstate circulation, include statements to the effect that the use of Dr. Miles' Nervine and/or Dr. Miles' Nervine Tablets is indicated for functional nervous disturbances, nervous headache, nervous irritability and excitability, sleeplessness and restlessness; and that "Dr. Miles' Anti-Pain Pills were made for those who occasionally suffer from distress of Headache, Neuralgia, Muscular or Periodic Pains." The cartons or containers in which such preparations presently are or recently have been packaged bear the following statements or representations:

DR. MILES' NERVINE

ACTIVE INGREDIENTS

Each Teaspoonful ($\frac{1}{8}$ oz.) Contains:

Sodium Bromide.....	4½ gr.
Potassium Bromide.....	4½ gr.
Ammonium Bromide.....	½ gr.

(Non-Alcoholic)

A Sedative

For the following Functional Nervous Disturbances: Nervous Headache Nervous Irritability and Excitability Sleeplessness and Restlessness.

Adult Dose.—1 teaspoonful in $\frac{1}{2}$ glass of water. Repeat in 1 hour if necessary but do not exceed 3 teaspoonfuls in 24 hours.

Caution.—Do not exceed recommended dosage, nor give to children. Overdosage or habitual use, or use in the presence of kidney disease may be dangerous. If skin rash appears discontinue use. If symptoms persist, see your physician.

DR. MILES' NERVINE TABLETS

AN EFFERVESCENT SEDATIVE

EACH TABLET CONTAINS:

Sodium Bromide.....	4½ gr.
Potassium Bromide.....	4½ gr.
Ammonium Bromide.....	½ gr.
Sodium Bicarbonate	
Citric Acid	

A Sedative For the Following Functional Nervous Disturbances: NERVOUS HEADACHE, SLEEPLESSNESS AND RESTLESSNESS NERVOUS IRRITABILITY AND EXCITABILITY.

Adult dose.—1 tablet dissolved in a glass of water. Repeat in 1 hour if necessary but do not exceed 3 tablets in 24 hours.

Tablets must always be dissolved in water before taking.

Caution.—Do not exceed recommended dosage, nor give to children. Overdosage or habitual use, or use in the presence of kidney disease may be dangerous. If skin rash appears discontinue use. If symptoms persist, see your physician.

DR. MILES' ANTI-PAIN PILLS

ACTIVE INGREDIENTS

EACH TABLET CONTAINS:

Acetanilid 2 Grains.
Tinct. Capsicum.
Caffeine.

For the Relief of SIMPLE HEADACHE AND NEURALGIA, PAIN CAUSED BY TOOTH EXTRACTION, FUNCTIONAL MENSTRUAL PAINS.

Dose.—1 tablet swallowed or chewed, followed by water. If not relieved, repeat after interval of 3 hours. Do not exceed 2 tablets in any 24 hours. NOT FOR USE BY CHILDREN.

Caution.—This preparation is for relief of occasional pain; not for continuous use. Do not exceed recommended dosage. Continuous use may

result in serious effects. If pain is unusual in character or recurs frequently, see your physician. MILES LABORATORIES, INC., Elkhart, Indiana, U. S. A.

As a matter of fact, the products designated Dr. Miles' Nervine and/or Dr. Miles' Nervine Tablets should not be used in excess of the dosage recommended and such excessive use may be dangerous, causing mental derangement and/or skin eruptions, and should not be taken by or administered to children. The "caution" appearing on the containers in which such products are packaged fails to include a warning to the effect that the repeated or excessive use of said drugs may result in mental derangement. The product designated Dr. Miles' Anti-Pain Pills should not be used in excess of the dosage recommended and such excessive use may be dangerous, causing collapse and/or dependence upon the drug, and should not be taken by or administered to children; and the "caution" appearing on the containers in which such product is packaged fails to include a warning to such effect. The advertisements contained in "Miles New Weather Almanac and Hand Book of Valuable Information" and/or other publications having interstate circulation and disseminated as hereinabove set forth fail to contain warnings or cautionary statements pertaining to the use of said products.

IT IS HEREBY AGREED by Miles Laboratories, Inc., that, in connection with the sale and distribution of its products in commerce as defined by said Act, or the advertising thereof by the means and in the manner above set forth, it will forthwith cease and desist from:

(a) Disseminating any advertisement pertaining to the preparations designated Dr. Miles' Nervine and/or Dr. Miles' Nervine Tablets or any other preparation of substantially the same properties, whether sold under such name or names, or any other name or names, which fails clearly to reveal that said preparation or preparations should not be used in excess of the dosage recommended, that such excessive use may be dangerous, causing mental derangement and/or skin eruptions, and that they should not be taken by or administered to children: *Provided*, however, that if the directions for the use of each of said preparations, whether appearing on the label, in the labeling, or in both label and labeling, contain adequate and specific warnings of its potential danger to health as aforesaid, said advertisement need contain only the cautionary statement: CAUTION, USE ONLY AS DIRECTED:

(b) Disseminating any advertisement pertaining to the preparation designated Dr. Miles' Anti-Pain Pills or any other preparation of substantially the same composition or possessing substantially the same properties, whether sold under such name or any other name or names, which fails clearly to reveal that said preparation should not be used in excess of the dosage recommended, that such excessive use may be dangerous, causing collapse, and/or dependence upon the drug, and that it should not be taken by or administered to children: *Provided*, however, that if the directions for the use of such preparation, whether appearing on the label, in the labeling, or in both label and labeling, contain adequate and specific warnings of its potential danger to health as aforesaid, said advertisement need contain only the cautionary statement: CAUTION, USE ONLY AS DIRECTED.

IT IS ALSO STIPULATED AND AGREED that if the said Miles Laboratories, Inc., should ever resume or indulge in any of the aforesaid methods, acts or practices which it has herein agreed to discontinue, or in the event the Commission should issue its complaint and institute formal proceedings against the respondent as provided herein, this stipulation as to the facts and agreement to cease and desist, if relevant, may be received in such proceedings as evidence of the prior use by the respondent of the methods, acts or practices herein referred to.

WITNESS the following signature this _____ day of _____, 19___

MILES LABORATORIES, INC.,

By _____

(Title)

FEDERAL TRADE COMMISSION,

By _____, *Chairman*.

Approved:

FEDERAL TRADE COMMISSION,

By OTIS B. JOHNSON, *Secretary*.

UNITED STATES OF AMERICA BEFORE FEDERAL TRADE COMMISSION

File No. 1-16535

IN THE MATTER OF CAPUDINE CHEMICAL COMPANY, A CORPORATION, RALEIGH,
NORTH CAROLINA

STIPULATION AS TO THE FACTS AND AGREEMENT TO CEASE AND DESIST

Pursuant to the provisions of the Federal Trade Commission Act (38 Stat. 717; as amended 52 Stat. 111; 15 U. S. C. A. Sec. 41), the Federal Trade Commission caused an investigation to be made of the acts and practices used by Capudine Chemical Company, a corporation, in commerce, as defined by the Act, and from such investigation has reason to believe that the aforesaid Capudine Chemical Company has been and is using unfair and deceptive acts and practices in commerce in violation of the provisions of said Act.

It now appearing that Capudine Chemical Company is willing to stipulate as to the facts and enter into an agreement to cease and desist from the use of the acts and practices as hereinafter set forth in such agreement, and that the Federal Trade Commission may be willing to accept such stipulation and agreement to cease and desist without prejudice to its right to issue a complaint and institute formal proceedings against the said Capudine Chemical Company, if at any time the Commission shall deem that such action is warranted;

IT IS HEREBY STIPULATED by and between the Federal Trade Commission and Capudine Chemical Company that the following is a true statement of the facts:

Capudine Chemical Company is a corporation organized and existing under the laws of the State of North Carolina with its principal place of business located in the City of Raleigh, State of North Carolina. It is now and has been for more than one year last past engaged in the business of offering for sale and selling a preparation known as "Capudine", "Hicks Liquid Capudine", "Hicks Capudine Liquid", and "Hicks Capudine". This preparation is a liquid and each dose (two teaspoonfuls or one-fourth of an ounce) contains three grains of antipyrine and seven and one-half grains of potassium bromide. It is alleged that the said preparation is helpful for the relief of headaches, neuralgia, muscular aches due to colds, simple nervousness, and headaches and discomforts due to menstruation. In connection with its use the said Capudine Chemical Company has caused a statement to be printed on the label of each bottle of said preparation to the effect that not more than two doses should be taken during any one twenty-four hour period; that the said preparation should not be given to children; that it should not be used by those having kidney or other chronic diseases and that its use should be discontinued immediately if drowsiness in day time, skin rash or other unusual symptoms occur; and that excessive, frequent or continued use may result in serious effects. In connection with the sale or offering for sale thereof the said Capudine Chemical Company has disseminated and caused to be disseminated:

(1) by United States mails, and in commerce as defined by said Act, for the purpose of inducing, and which is likely to induce, directly or indirectly, the purchase of the said commodity, and

(2) by other means for the purpose of inducing, and which is likely to induce, directly or indirectly, the purchase in commerce of said commodity, certain advertising matter, which includes statements to the effect that the said preparation will relieve the discomforts of headaches, neuralgia, muscular aches due to colds, headaches and discomforts due to menstruation and as a sedative for simple nervousness.

In the said advertising matter disseminated as aforesaid, the said Capudine Chemical Company failed to reveal therein the material fact that there is a risk of harm in the use of said preparation as hereinafter more fully set forth.

The said Capudine Chemical Company hereby admits:

That the said preparation should not be used in excess of dosage recommended; that its too frequent or long continued use may, in some instances, cause skin eruptions or mental derangement; and that it should neither be taken by nor administered to children.

IT IS HEREBY AGREED by the said Capudine Chemical Company that in the dissemination of advertising by the means and in the manner above set out of a medicinal preparation now designated as "Capudine", "Hicks Liquid Capudine", "Hicks Capudine Liquid" and "Hicks Capudine", or any other preparation of substantially the same composition or possessing substantially the same properties, whether sold under those names or any other names, it will forthwith cease and desist from disseminating any advertisements which fail to reveal that the said preparation should not be used in excess of the dosage recommended; that its frequent or long continued use may be dangerous, causing skin eruptions or mental derangement; and that it should not be taken by nor administered to children; *Provided however*, That such advertisements need only contain the statement: "CAUTION, USE ONLY AS DIRECTED", if and when the directions for use, wherever they appear on the label, in the labeling, or in both label and labeling, contain a warning or caution to the same effect.

The said Capudine Chemical Company further agrees not to publish or cause to be published any testimonial containing any representation contrary to the foregoing agreement.

IT IS ALSO STIPULATED AND AGREED that if the said Capudine Chemical Company should ever resume or indulge in any of the aforesaid acts or practices which it has herein agreed to discontinue, or in the event the Commission should issue its complaint and institute formal proceedings against the said Capudine Chemical Company, as provided herein, this stipulation as to the facts and agreement to cease and desist, if relevant, may be received in such proceedings as evidence of the prior use by Capudine Chemical Company of the acts or practices herein referred to.

WITNESS the following signatures this _____ day of _____, 1942,

CAPUDINE CHEMICAL COMPANY,

By _____

By _____

FEDERAL TRADE COMMISSION,

By _____

Chairman.

APPROVED:

FEDERAL TRADE COMMISSION,

By OTIS B. JOHNSON, *Secretary*.

UNITED STATES OF AMERICA BEFORE FEDERAL TRADE COMMISSION

File No. 1-16221

IN THE MATTER OF EMERSON DRUG COMPANY, A CORPORATION

STIPULATION AS TO THE FACTS AND AGREEMENT TO CEASE AND DESIST

Pursuant to the provisions of the Federal Trade Commission Act (38 Stat. 717; as amended 52 Stat. 111; 15 U. S. C. A. Sec. 41), the Federal Trade Commission caused an investigation to be made of the acts and practices used by Emerson Drug Company, a corporation, in commerce as defined by the Act, and from such investigation has reason to believe that the aforesaid corporation has been or is using unfair and deceptive acts and practices in commerce in violation of the provisions of said Act.

It now appearing that the said Emerson Drug Company is willing to stipulate as to the facts and enter into an agreement to cease and desist from the use of the acts and practices as hereinafter set forth in such agreement, and that the Federal Trade Commission may be willing to accept such stipulation and agreement to cease and desist without prejudice to its right to issue a complaint and

institute formal proceedings against the said Emerson Drug Company if at any time the Commission shall deem that such action is warranted;

IT IS HEREBY STIPULATED by and between the Federal Trade Commission and Emerson Drug Company that the following is a true statement of the facts:

Emerson Drug Company is a corporation having its principal place of business located in the City of Baltimore, State of Maryland. It is now, and has been for more than one year last past, engaged in the business of offering for sale and selling a preparation known as Bromo-Seltzer. This preparation is made in the form of crystals, and one teaspoonful (or dose) contains $2\frac{1}{2}$ grains of acetanilid and 5 grains of sodium bromide. It is alleged that the said preparation is helpful for the relief of headaches, neuralgia, upset stomach and as a sedative for simple nervousness. In connection with its use the said Emerson Drug Company has caused a statement to be printed on the label of each package of the said preparation to the effect that not more than two doses should be taken during any one twenty-four hour period; that the said preparation should not be given to children; that it should not be used by those having kidney or other organic diseases; and that frequent or continued use may result in serious effects. In connection with the sale or offering for sale thereof, the said Emerson Drug Company has disseminated and caused to be disseminated:

(1) by United States mails, and in commerce as defined by said Act, for the purpose of inducing, and which is likely to induce, directly or indirectly, the purchase of the said commodity, and

(2) by other means for the purpose of inducing, and which is likely to induce, directly or indirectly, the purchase in commerce of said commodity, certain advertising matter, which includes statements to the effect that the said preparation will relieve the discomforts of headaches and neuralgia; settle upset stomachs, and act as a sedative in simple nervousness.

In the said advertising matter disseminated as aforesaid, the said Emerson Drug Company failed to reveal therein the material fact that there is a risk of harm in the use of said preparation, as hereinafter more fully set forth.

The said corporation hereby admits:

That the said preparation should not be used in excess of the dosage recommended; that its too frequent or long continued use may, in some instances, cause dependence upon the drug, skin eruptions or mental derangement; that its use may cause collapse, and that it should neither be taken by nor administered to children.

IT IS HEREBY AGREED by the said Emerson Drug Company that in the dissemination of advertising, by the means and in the manner above set out, of a medicinal preparation now designated Bromo-Seltzer, or of any other preparation of substantially the same composition or possessing substantially the same properties, whether sold under that name or any other name, it will forthwith cease and desist from disseminating any advertisements which fail to reveal that the said preparation should not be used in excess of the dosage recommended; that its frequent or long continued use may be dangerous, causing dependence upon the drug, skin eruptions or mental derangement; that its use may cause collapse; and that it should not be taken by nor administered to children: *Provided, however*, that such advertisements need only contain the statement: "CAUTION, USE ONLY AS DIRECTED," if and when the directions for use, wherever they appear on the label, in the labeling or in both label and labeling, contain a caution or warning to the same effect.

The said Emerson Drug Company further agrees not to publish or cause to be published any testimonial containing any representation contrary to the foregoing agreement.

IT IS ALSO STIPULATED AND AGREED that if the said Emerson Drug Company should ever resume or indulge in any of the aforesaid acts or practices which it has herein agreed to discontinue, or in the event the Commission should issue its complaint and institute formal proceedings against the said Emerson Drug Company, as provided herein, this stipulation as to the facts and agreement to cease and desist, if relevant, may be received in such proceedings as evidence

of the prior use by Emerson Drug Company of the acts or practices herein referred to.

WITNESS the following signatures this ——— day of ———, 1942.

EMERSON DRUG COMPANY,

By ———, *President*.

By ———, *Secretary*.

FEDERAL TRADE COMMISSION,

By ———, *Chairman*.

FEDERAL TRADE COMMISSION,

By OTIS B. JOHNSON, *Secretary*.

Approved :

UNITED STATES OF AMERICA BEFORE FEDERAL TRADE COMMISSION

File No. 1-13863

IN THE MATTER OF T. M. STANBACK, ADA STANBACK, FRED J. STANBACK, ELIZABETH C. STANBACK, WACHOVIA BANK & TRUST COMPANY OF WINSTON-SALEM, NORTH CAROLINA, TRUSTEES FOR T. M. STANBACK, JR., C. W. STANBACK, FRED J. STANBACK, JR., NANCY JEAN STANBACK, COPARTNERS, TRADING AS STANBACK COMPANY, LTD.

STIPULATION AS TO THE FACTS AND AGREEMENT TO CEASE AND DESIST

Pursuant to the provisions of the Federal Trade Commission Act (38 Stat. 717, as amended, 52 Stat. 111; 15 U. S. C. A., sec. 41), the Federal Trade Commission caused an investigation to be made of the methods, acts, and practices used by T. M. Stanback, Ada Stanback, Fred J. Stanback, Elizabeth C. Stanback, Wachovia Bank & Trust Company of Winston-Salem, North Carolina, trustees for T. M. Stanback, Jr., C. W. Stanback, Fred J. Stanback, Jr., Nancy Jean Stanback, copartners, trading as Stanback Company, Ltd., in commerce as defined by the Act, and from such investigation has reason to believe that the aforesaid individuals and the aforesaid Wachovia Bank & Trust Company of Winston-Salem, North Carolina, are using unfair methods of competition and unfair and deceptive acts and practices in commerce in violation of the provisions of said Act.

It now appearing that T. M. Stanback, Ada Stanback, Fred J. Stanback, Elizabeth C. Stanback, Wachovia Bank & Trust Company of Winston-Salem, North Carolina, trustees for T. M. Stanback, Jr., C. W. Stanback, Fred J. Stanback, Jr., Nancy Jean Stanback, are willing to stipulate as to the facts and enter into an agreement to cease and desist from the use of the methods, acts, and practices as hereinafter set forth in such agreement, and that the Federal Trade Commission may be willing to accept such stipulation and agreement to cease and desist without prejudice to its right to issue a complaint and institute formal proceedings against the said T. M. Stanback, Ada Stanback, Fred J. Stanback, Elizabeth C. Stanback, Wachovia Bank & Trust Company of Winston-Salem, North Carolina, trustees for T. M. Stanback, Jr., C. W. Stanback, Fred J. Stanback, Jr., Nancy Jean Stanback, if at any time the Commission shall deem that such action is warranted;

IT IS HEREBY STIPULATED by and between the Federal Trade Commission and T. M. Stanback, Ada Stanback, Fred J. Stanback, Elizabeth C. Stanback, Wachovia Bank & Trust Company of Winston-Salem, North Carolina, trustees for T. M. Stanback, Jr., C. W. Stanback, Fred J. Stanback, Jr., Nancy Jean Stanback, that the following is a true statement of the facts:

PARAGRAPH ONE: Stanback Company, Ltd., is the trade name under which the following individuals conduct business at Salisbury, North Carolina: T. M. Stanback; Ada Stanback; Fred J. Stanback; Elizabeth C. Stanback; Wachovia Bank & Trust Company of Winston-Salem, North Carolina, trustees for T. M. Stanback, Jr., C. W. Stanback, Fred J. Stanback, Jr., Nancy Jean Stanback.

The business, in which the said copartners are now and for a number of years last past have been engaged, consists of the manufacture of a preparation in-

tended to be used for the relief of certain aches and pains and of the sale of said preparation in commerce between and among various States of the United States. The said copartners cause and have caused such preparation, when sold, to be shipped from their place of business in the State of North Carolina to purchasers thereof located in a State or States other than North Carolina. They are now and at all times herein referred to have been engaged in competition with other partnerships and with individuals, firms, and corporations likewise engaged in the sale of preparations intended for similar uses in interstate commerce.

PARAGRAPH TWO: In the course and conduct of business as described in Paragraph One hereof, the aforesaid copartners, trading as Stanback Company, Ltd., have disseminated and caused to be disseminated—

(1) by United States mails, and in commerce, as defined by said Act, for the purpose of inducing, and which is likely to induce, directly or indirectly, the purchase of the preparation, and

(2) by other means for the purpose of inducing, and which is likely to induce, directly or indirectly, the purchase in commerce of said preparation, certain advertising and printed matter recommending the use of the preparation by prospective purchasers, and which advertising and printed matter has failed to reveal therein the material fact that there is a risk of harm in the use of said preparation as hereinafter set forth.

The said copartners hereby admit that the said preparation should not be used in excess of the dosage recommended, since such use may cause dependence upon the drug, skin eruptions, mental derangement, or collapse, and that it should not be taken by, or administered to, children.

The aforesaid advertising and printed matter represented the Stanback preparation to be "different," "the only preparation wherein you get the right amount of several pain-relieving ingredients blended together in these proportions," "the finest, fastest headache preparation ever used," "gentle and kind to your system," "will not leave you jittery and upset after taking it." As a matter of fact, there are other preparations of practically identical formula which are being and for some time past have been sold on the competitive market, and, therefore, there is no proper basis for the claims that the Stanback preparation is either different, the only preparation of its kind, or the finest or fastest acting headache preparation. Its effect upon the system of certain individuals, who have continuously used the preparation over a long period of time, would not be properly described as "gentle and kind" and, in such cases of long continued use followed by a cutting off of the dosage, it would leave one in a jittery and upset condition.

IT IS HEREBY AGREED by T. M. Stanback, Ada Stanback, Fred J. Stanback, Elizabeth C. Stanback, and Wachovia Bank & Trust Company, trustee for T. M. Stanback, Jr., C. W. Stanback, Fred J. Stanback, Jr., and Nancy Jean Stanback that, in connection with the dissemination of advertising by the means and in the manner above set out of the preparation designated "Stanback," or any other preparation of substantially the same composition or possessing substantially the same properties, whether sold under that name or any other name, they and it and each of them will cease and desist forthwith from disseminating any advertisement which fails conspicuously to reveal therein that the said preparation should not be used in excess of the dosage recommended, since such use may cause dependence upon the drug, skin eruptions, mental derangement, or collapse, and that it should not be taken by, or administered to, children; PROVIDED, however, that such advertising need contain only the statement:

"CAUTION: Use only as directed."

if and when the directions for use, wherever they appear on the label, in the labeling, or in both the label and labeling, contain a caution or warning to the same effect.

The said copartners and trustees also agree to cease and desist from stating or representing in the aforesaid advertising, or by other means, that the said preparation is "different" or "the finest or fastest acting." They and it also agree to cease and desist from the use in said advertising of any statement or representation which tends or may tend to convey the belief to prospective consumers that the effect of the use of said preparation upon the system of the

user will be "gentle and kind" or will not leave the user "jittery and upset" in those cases where the said product has been used too frequently or excessively over a long period of time.

IT IS ALSO STIPULATED AND AGREED that if the said T. M. Stanback, Ada Stanback, Fred J. Stanback, Elizabeth C. Stanback, and Wachovia Bank & Trust Company, trustee for T. M. Stanback, Jr., C. W. Stanback, Fred J. Stanback, Jr., and Nancy Jean Stanback, should ever resume or indulge in any of the aforesaid methods, acts, or practices which they have herein agreed to discontinue, or in the event the Commission should issue its complaint and institute formal proceedings against the respondents as provided herein, this stipulation as to the facts and agreement to cease and desist, if relevant, may be received in such proceedings as evidence of the prior use by the respondents of the methods, acts, or practices herein referred to.

WITNESS the following signatures this ----- day of -----, 19--.

T. M. STANBACK,
ADA STANBACK,
FRED J. STANBACK,
ELIZABETH C. STANBACK.

WACHOVIA BANK & TRUST COMPANY,
By -----, *Trustee*.

For T. M. Stanback, Jr.,
C. W. Stanback,
Fred J. Stanback, Jr.,
Nancy Jean Stanback.

FEDERAL TRADE COMMISSION,
By -----, *Chairman*.

Approved :

FEDERAL TRADE COMMISSION,
By OTIS B. JOHNSON, *Secretary*.

Mr. SADOWSKI. All right. The committee will stand in recess until 2 o'clock.

(Whereupon at 12:10 p. m., the committee recessed until 2 p. m., same day.)

AFTERNOON SESSION

(Reconvened at 2:30 p. m.)

Mr. SADOWSKI. The committee will be in order.

Mr. Cassedy?

Mr. CASSEDY. Mr. Chairman, before you proceed, I have copies of the stipulations in four cases that I was requested to bring for the benefit of the committee.

I did not do this during my testimony, because I was not authorized to do so by the Commission. We have a statute in our act that prohibits the disclosure of any information until authorized by the Commission.

But I have now been authorized, and I have the stipulations here with me to present to the committee.

Mr. SADOWSKI. Very well.

Mr. DAVIS. Mr. Chairman, I suggest that those, instead of going into my statement, go into Mr. Cassedy's statement.

Mr. REECE. That is right.

Mr. SADOWSKI. That will be placed in the record at the same point where the complaints appear.

Mr. DAVIS. Mr. Chairman, are you ready for me to proceed?

Mr. SADOWSKI. Yes.

STATEMENT OF HON. ERWIN DAVIS—Resumed

Mr. DAVIS. When I was giving the figures on the cases that had been stipulated, I forgot to mention a memorandum from the Chief of our Records Division, giving the number from March 21, 1938, to February 21, 1946, the period since the enactment of the Wheeler-Lea amendment.

It shows during that period 1,964 stipulations were successfully negotiated by the chief trial examiner. I had already given those facts. The radio and periodical division had negotiated 1,222; making a total of 3,186 stipulations since the enactment of the Wheeler-Lea amendment.

Now, Mr. Chairman, and gentlemen, about the time of adjournment, I was asked by Congressman Reece if we commissioners read that entire record in the cement case, and I said that we did not.

There were 50,000 pages, a greater portion of which was introduced by one or more of the 77 respondents through their scores of attorneys.

I was leading up to an explanation of our procedure. I would like to take that up. For instance, after a case has been referred to a trial examiner for the taking of evidence, and after he has completed the taking of all evidence either side desires to present, then he prepares a report of the facts.

That report is served upon counsel for the respondent and the Commission. Then they are permitted to file exceptions, any exceptions they wish to make to the report, either as to some inclusion or some exclusion of testimony.

Now, generally speaking, after the conclusion of the taking of evidence, the trial examiner asks the attorneys for both sides if they wish to submit any recommended findings. Then he takes those and considers them in formulating his own report.

Rule 20 provides as follows:

The trial examiner shall, as soon as practicable, and not later than 30 days after receipt by him of the complete stenographic transcript of all testimony and all exhibits in the proceeding, make his report upon the facts, conclusions of fact, conclusions of law, and recommendation for appropriate action by the Commission.

A copy of such report shall forthwith be served upon each attorney for the Commission and upon each attorney for respondents, and upon each respondent not represented by counsel.

After they get through with their report on the facts, then both sides file their briefs. First the Commission attorney files his brief, and then the counsel for the respondent files his brief.

Then if either side asks for an oral argument, the Commission invariably grants it, an argument before the Commission at a public hearing.

By the way, I want to say in that connection, gentlemen, that we do not have any star-chamber proceedings. All of the evidence is taken at public hearings. Anybody can be present who wants to be. And all of the hearings before the Commission are in our hearing room and anybody and everybody can attend them who desire so to do.

Now, after all of this the Commission holds a final hearing, at which time it also passes upon any exceptions to testimony in the event either side desires to appeal from the action of the trial examiner, they are briefed and heard at the same time.

When it is all heard, we pursue the same course that they do in courts. The Director of the Docket Section assigns cases to the Commissioners, in order. They are not picked out or anything of that kind. The Commissioner studies the case and the briefs and everything involved in it and then makes a written report to the Commission, in which he makes a recommendation, either for an order or for dismissal, or for an order to this extent, or whatever their recommendation is.

Then the entire Commission takes it up and after thorough discussion, et cetera, they finally decide on what they want to do. Now, if and when an order to cease and desist is directed, which is the most that we can do, as I have explained before; I want to explain that we have three of our ablest attorneys who are legal consultants of the Commission. They do not have a thing to do with the direction of the complaint, with the investigation of the case, the trial of the case, or any thing at all. They are absolutely detached from everything from everything that has been done.

Now, not before but after we have made a decision, then we refer the record to these legal consultants to prepare a finding of facts, in which they set out all the salient facts, citing to the transcript numbers with respect to each item found, and then draft an order accordingly.

They submit that back to the Commission. As I said, we are in conference every morning from 10 until approximately 12:30, and frequently we have so much to do that we will meet in the afternoon.

The reason we refer these records to these legal consultants is because it would be physically and mentally impossible for the Commission to read all of these transcripts.

If we spent 24 hours a day, that still could not be done. Because you just could not do it, and then we have so much other work to do. We have jurisdiction over five different statutes. But I want to say this: The Commission reads the pleadings, the briefs, the report of the trial examiner in which each side of course raises all of the questions they are relying upon.

Those are all fully discussed, so that when the Commission reads the briefs they read the evidence where there is a controversy as to what the facts are.

Because in their briefs where they discuss the testimony, they refer to what is being talked about, and we do read the evidence in the transcript relating to controversial questions.

MR. REECE. When you reach the appropriate point, I want to ask this question. Judge, by way of summary, and see if I understand correctly this procedure: The Commission does not read, the reasons for which I can readily understand, the complete record in these voluminous cases. The case comes to the Commission through a statement of facts by the examiner, the briefs by the Commission attorneys and the respondents' attorneys, or the respondent, and in case of oral arguments, by arguments before the Commission?

MR. DAVIS. In addition to that we have all arguments transcribed by these independent reporters.

MR. REECE. Then, as you state, in case of a controversial point which is in disagreement between the two attorneys, the Commission reads that?

MR. DAVIS. Checks the evidence in controversy.

Mr. REECE. Checks the evidence in controversy. Now, what is the difference between that procedure and the procedure followed by an appellate court?

Mr. DAVIS. Well, I do not think that an appellate court could do nearly that much.

Mr. REECE. I am not referring to decisions which might be appealed from the Federal Trade Commission, but I am now referring to the procedure in appellate courts generally; that is, the procedure which appellate courts follow in reaching a determination on a case which has been brought before them.

The two procedures are quite comparable, it would seem; is that correct?

Mr. DAVIS. Well, yes; I should say so.

Mr. REECE. That is, they are comparable in these points: The appellate court does not read all of the record of evidence, but only the evidence relating to the points in controversy and in disagreement between the attorneys on the two sides.

The appellate court does not see the witnesses, and those two conditions obtain likewise under your procedure so far as the Commission is concerned, it would seem.

Mr. DAVIS. Yes. But with respect to not seeing the witnesses, the transcript in the case sets out by an expert reporter every question that has been asked and every answer that has been given, everything that occurs there; and about the only thing that you cannot see that you could see if the witness were before you is perhaps any change in expression or color or something of that kind.

Of course as far as that is concerned we ourselves are at the same disadvantage that any appellate court is, because no appellate court confronts the witness personally.

But our trial examiner, who is an absolutely unbiased official, has had no relation whatever to the case except when he goes into the trial of it, does of course see them and makes his conclusions and recommendations.

Here is another thing that I want to speak to you about, with respect to that cement case. When we referred that case to the legal consultants, it took one of our consultants 6 months solid time to prepare the finding of facts.

Mr. REECE. Before you go into the case, if I may ask this question, since the importance of the trial examiner has come up here in connection with the discussion of the procedure, does the Commission use more than one examiner in a case?

Mr. DAVIS. Not if it can be avoided.

Mr. REECE. If it cannot be avoided?

Mr. DAVIS. Unless it is by agreement.

Mr. REECE. Well, if it cannot be avoided and is not by agreement does the new examiner try the case anew?

Mr. DAVIS. We only had one case go to the courts.

Mr. REECE. Was that the Buchsbaum case?

Mr. DAVIS. Yes. The trial examiner died and the chief trial examiner appointed another man to take his place.

Practically always the respondents have agreed for good cause for there to be a change in the trial examiner, but in this case they did not. They refused to agree. So the court of appeals reversed the Commission because they did not try the case anew.

The Solicitor General has applied for certiorari, because he thinks it is distinctly against public interest. Suppose after taking nearly all the evidence in that cement case, with large expense to both sides and 3 or 4 years' time, the trial examiner had died: In most jurisdictions, in my State, for instance, and Mr. Reece's State, we have an act that was passed to brush aside all technicalities, where it still appeared that the ends of justice had been met. But at any rate that is pending in the Supreme Court. We will have to wait to see what they say on it, but aside from that it was our general policy to have the same trial examiner go through unless the other side agreed, before this decision was rendered.

Mr. REECE. Was the examiner changed in the Miles case or one of these cases which are now pending?

Mr. DAVIS. Mr. Kelley can answer that.

Mr. KELLEY. It has been the policy of the Commission not to switch examiners for a matter of convenience, but sometimes an examiner gets sick. There is a long protacted sickness. In this Buchsbaum case, the examiner died.

Now, the Solicitor General has asked for certiorari in that case to the Supreme Court. Judge Sparks held that that was unconstitutional, on the question of the examiner dying, and that the case would have to be tried de novo with a new examiner.

Putting that on a constitutional ground, a long while ago I heard Judge Milburn, who at that time was 83 years old, turn to a young lawyer who had stated that he would stake his reputation on a legal matter, and tell him that, "When you are as old as I am, you will not stake your reputation on a legal matter."

But if that is unconstitutional, Congress cannot even change it. Last week, Friday, the Interstate Commerce Commission called me, and they wanted a meeting with us on that point. When I told them that it was with the Solicitor General, and that he had asked for certiorari, they said they were going over to see him. That would affect their Commission very, very much. They go much farther in that connection than the Federal Trade Commission.

They have an examiner go out, and he makes a very broad trip, and he handles 10, and sometimes 15 and 20 matters, and when he comes back to Washington he does not write the report.

Our examiners write their own reports. Over at the ICC they have a corps of experts that take the record that was gathered by this examiner and write the report. That is why that and other departments of the Government are vitally interested in this case.

As I say, it is going to the Supreme Court, and I have not the slightest doubt in my mind that what was done was not unconstitutional, and that decision of Judge Sparks will be set aside. However, in the event that it is unconstitutional, Congress cannot change it, and it will have to stand, and we will have to try to de novo every case where the examiner dies, or every case where an examiner becomes incapacitated.

Mr. REECE. In this Miles case, if that is the one I have in mind, in which the examiner was changed, did the examiner have a prolonged illness? That case seems to have been pending or in the course of development for a considerable period of time.

Mr. KELLEY. I do not know. But it does seem to me that we are presuming that there is something wrong about it.

I do not think there is anything wrong about appointing a new examiner where one dies. Also there is nothing wrong with appointing a new examiner where one becomes for some good reason not able to go ahead.

I do not think it is unconstitutional. I do not, however, think it is good policy to substitute examiners for matters of convenience.

Mr. REECE. I notice this statement here in the decision with reference to the Buchsbaum case. The Commission contends that what it calls the marked difference between the functions and authority of trial judges and masters, on the one hand, and trial examiners on the other, precludes the application of the rule of confrontation in the authorities just referred to.

Hence, it argues that the findings of examiners, being advisory only, there is not present in their findings the principal consideration; that is to say, finality of fact actual which requires a trial de novo in the event of death or disability of a judge or a master.

Then the court states "We think this does not meet the petitioner's contention."

Mr. KELLEY. Well, all I can say is that I have to very fundamentally disagree with Judge Sparks. I do not think that the cases which Judge Sparks cites to support the proposition are in point at all. I have read them. All I can say is that the Solicitor General has applied to the Supreme Court for certiorari, and I hesitate at making any prophecies, but I firmly believe that that decision of Judge Sparks, which rests upon the grounds of unconstitutionality, I do not think will stand.

Mr. REECE. I am not sure but that I share, at least in some measure, your views in that regard, Judge, but whatever the ruling of the court may ultimately be, that would not decide the question which we are discussing here of the propriety of a change, except where necessary, and then possibly as to whether a new examiner should try a case de novo.

Mr. DAVIS. As far as the Federal Trade Commission is concerned, it is not very important. It is true that once in a while an examiner will die. Or for months he will be ill and unable to go on.

It just means that the Commission in those very few cases will have to do it over again.

Mr. REECE. I was just wondering how long in this Miles case——

Mr. KELLEY. But with respect to other agencies of the Government who have a different practice, of some other body than the man who tried the case preparing their report, it will make a big difference.

Mr. REECE. In connection with the Miles case, in which the examiners were changed, I was just wondering how long a delay would have occurred to have waited on a recovery of the examiner, and I have no information there.

Mr. KELLEY. That I do not know. Frequently we try to save expense. And when an examiner goes out sometimes we will have him try two or three cases.

Sometimes a respondent will want a delay, or sometimes they will want to go on sooner. Frequently, we will agree with the counsel for the respondent for the substitution of a new examiner.

We do not do it unless they want it done. That works both ways.

Mr. DAVIS. And when that is done, both examiners sign the report.

Mr. O'HARA. Judge, could I ask one question in connection with the importance of this matter as to the examiners: Who appoints the examiners? How are they appointed?

Mr. DAVIS. They are appointed by the Chief Trial Examiner, but approved on the minutes, and that would appear on the minutes of the Commission?

Mr. O'HARA. They are regular employees of the Government? That is, of the Commission?

Mr. DAVIS. Oh, yes, regular employees. And most of them had had years of experience. We always undertook to get high class attorneys and practically all of them had practiced for years before they were appointed by the Commission.

Most of them are more elderly than most of our attorneys. Practically all of them have fine backgrounds. But they do not do anything else.

Now, gentleman, while we are on the subject of a finding of fact, I want to call this to your attention:

Here is a finding of facts in the cement case, that we were discussing, 134 pages in the finding of facts alone, not the transcript but the finding of facts.

Here is another in the National Standard Parts Association and others, a finding of facts of 60-odd pages.

Here is another one, against the Rigid Steel Conduit Association, in which the finding of facts covers 50 pages.

Now, I want to call your attention to one volume of the "Federal Trade Commission Decisions." This is No. 7. All of our decisions are first printed in the official register, as well as our stipulations and other orders.

These volumes embrace all of our decisions and we now have 37 volumes, and they are coming out 3 and 4 a year.

So, when you change the procedure of the Federal Trade Commission you change and destroy for many practical purposes many decisions and impair the value of all these volumes.

Now, this volume has the entire cement case in it, as well as various others. If any of you want to examine it, that illustrates the matter.

Mr. REECE. Judge, the outline of the procedure which the Commission follows has been very interesting and helpful to the committee.

Mr. DAVIS. Yes, it is absolutely in point with the bill.

Mr. REECE. Now, you come to the point where the Commission renders the decision in a case.

Up to this point, in what way would the enactment of H. R. 2390 cause any change in the procedure in view of the statement that you made earlier that the Commission decides a case on the preponderance of the evidence?

Mr. DAVIS. Well, I surmised that the purpose of the bill was to give the respondent another avenue of escape. Consequently, he will introduce more evidence, cumulative evidence and other evidence that may or may not be relevant, and all of that, and in the same way the Commission will undertake to make rebuttal to that.

In other words, when it is going to be tried, on appeal, under a different rule, of course that is so. And remember this: It is only a small percentage, an infinitesimal percentage of the people who fight to continue these practices, but they will grab at straws.

They will do all they can to clog up the record, hoping perhaps that the courts may apply the doctrine that some courts, they say, do or have done—have applied—and that is that the preponderance of the evidence refers to quantity, numerical value; in other words, the one that introduces the most witnesses, whether they knew much or not. And Dean Stason said that such a rule was unsound and he indicated that he thought there was danger of that under the Reece bill.

Mr. REECE. You evidently misunderstood the purpose of my question.

Mr. DAVIS. No; I knew what your question was.

Mr. REECE. My question was based upon a statement in the Commission's letter to the committee in which it is stated that the enactment of the bill would greatly increase the volume of the work of the Commission.

Mr. question was: Up to the point where you have now arrived, where the Commission is rendering a decision, in what way would the enactment of H. R. 2390 change the procedure or actions of the Commission or of its staff?

Mr. DAVIS. Well, as I have told you, and as Dean Stason explained, and as anybody who is familiar with the subject knows: Suppose you provide that it had to be shown beyond a reasonable doubt in the court of appeals that the cease and desist order should issue.

Do you not suppose that they would introduce more evidence, go to further steps, and all that, when they were fighting?

Mr. REECE. Of course that is an accepted rule in criminal procedure, but not in civil procedure.

Mr. DAVIS. I know, but let me tell you, gentlemen:

It is a difficult proposition for the Federal Trade Commission and any other agency acting in the interests of the public. It is always a difficult matter to get their cases tried, when in these cases, most of which are litigated, they employ the ablest lawyers in this country. There will frequently be a half a dozen or more of them, to our one attorney. They are fighting every inch of the ground.

They are raising every question they can and making it difficult to protect the public interest.

Mr. REECE. But the question of appeal does not come up until after the Commission has rendered its decision, and in view of the statement in the Commission's letter to the committee, I am trying to ascertain in what way the enactment of this amendment to the act would change or modify your procedure.

Mr. DAVIS. Because if the respondent continues introducing a lot of testimony, why the Commission's attorney would undertake to do so. And there is no question about that. What is the purpose of it? The purpose of it is to give them another trial de novo that you are not applying to any other commission.

That does not apply in any State or anywhere else so far as I know on appeal. It is contrary to policy and practice and common sense, in my opinion, to give an appellate court the right to try the issues de novo.

Mr. REECE. You mean on the record?

Mr. DAVIS. Well, I mean just what I say.

Mr. KELLEY. What the Judge means, I am sure, is that it will not change the method and it will not change the procedure, but it will decidedly change the effect all the way through.

I can certainly see counsel before an examiner say :

I am not trying this case for you, and I am not trying this case for the Commission. I am making my record here for the circuit court of appeals who is going to weigh the evidence. And you dare shut out that testimony on the ground that it is cumulative, and I will get you reversed by the circuit court of appeals.

Now, you are getting into three trials de novo, you might say. It does not change the method. But the effect of that amendment is going to change the nature and the character of the testimony from the first witness to the last, as well as the de novo trial in the circuit court of appeals.

You cannot get away from it.

Mr. DAVIS. Furthermore, the complaint and the finding of facts and the order must all conform, and if they do not it is reversible error in the circuit court of appeals. And the circuit court of appeals can and does reverse the Federal Trade Commission on many things that involve legal questions.

Mr. REECE. That brings me to the point where I would like to review a question that I propounded to Mr. Wooden.

Mr. DAVIS. I tell you, Mr. Chairman——

Mr. REECE. Let me try to make the point.

Mr. DAVIS. I know, but you have taken up more time during these hearings than everybody else put together and I do not think that is fair to the Federal Trade Commission to have to reply to these innumerable things, many of which are wholly misleading, and many of them absolutely false.

Mr. REECE. That, Judge, is one man's opinion, and such statements by you do not disturb me in the least. I will be glad to come back to this question later on, since you referred to the reversals, I wanted to ask this question: Have the courts overruled the Commission on a question of fact except where it held that there was no evidence to support the decision, that is, the findings of the Commission, such as in the Carlay case and some of the other cases which were cited here?

Mr. DAVIS. Well, as a matter of fact——

Mr. REECE. I propounded that question in advance so that there would be an opportunity to look up the cases.

Mr. KELLEY. What is the question now?

Mr. DAVIS. I see you are in for taking up all of our time.

Mr. REECE. I feel this raises a rather important point.

Mr. DAVIS. We have a lot of important things to say. Of course, Congressman Reece, we do not expect to convince you through any answer we give, but we would like to have an opportunity to present our case to the other members of the Committee and make a record for the full committee.

Mr. REECE. That is what you want to do: then, as you say in a case where there is a right of appeal you are making a record for appeal to the full committee. That is what you want to do, is that right?

Mr. DAVIS. That is not right.

Mr. REECE. However, getting back to the serious question I propounded; that is, Judge, have the courts overruled the Commission on facts except where the court held at the same time that there was no evidence to support the findings of the Commission such as the Carlay case and two or three others which we have cited here?

Mr. KELLEY. There might have been a case or two, or maybe three, where on some minor issue there might have been no evidence at all on the point.

Let me finish.

Of course, if such a thing slipped through on some minor point out of so many cases, if in that case it was appealed to the court, the court would set that order aside.

In the Carlay case, Judge Lindley set that order aside because the court did not think that the evidence measured up to its definition there of substantial evidence. I do not know what I am going to do. I think Judge Lindley is wrong.

You talk about there not being any evidence in that case. There is not only evidence in that case, but I think it is very, very substantial evidence. So do the Food and Drug people think it is very substantial. I do not know whether I am going to ask the Commission for a certiorari in that Carlay case or not, but I do not know of any case, and there are probably a very few cases where the court might have found on some minor issues there was not any evidence in the record to support it—

Mr. DAVIS. No substantial evidence.

Mr. Kelley—that is, no substantial evidence.

Do I answer your question?

Mr. REECE. I do not think you quite understood my question, Judge. You answered one phase of the question that I had in mind in asking it, but my question was: Do you know of any cases in which the appellate court ruled adversely to the Commission on a matter of fact in which it did not, at the same time, hold that there was no evidence to support the facts?

Mr. KELLEY. No. Practically all of our cases are attacked and attacked vigorously on the ground that there is no evidence or that the evidence is not substantial. Practically all of those cases on those grounds were decided by the courts adverse to the respondents, but I would not want to say that out of the hundreds of cases that there was not some issue in some of the cases that might have lacked substantial evidence. I cannot conceive of any tribunal or court handling that volume of cases that would be in every instance, on every issue, perfect.

Mr. REECE. However, can you or some other member of the staff, or member of the Commission, cite a case or cases in which the Commission has been overruled on facts where the court did not at the same time hold that there was no evidence to support the facts? I want to get an answer if I can.

Mr. KELLEY. I can not cite those cases, but I can say this, if the court ever held that there was no evidence, the court automatically would set the order aside. It would have to. I do not recall those cases except outside of two or three where the court differed with the Commission on the sufficiency of the evidence. However, any time that a court would find that there was no evidence, automatically the order would be set aside.

Mr. DAVIS. Mr. Chairman and gentlemen, continuing my effort to explain the procedure of the Commission, references have been made to our system of stipulation, and I have several of these executed stipulations here, and I would like for one of them to be placed in the record, and I would like for any members who desire to examine it to do so.

(The stipulation referred to is as follows:)

UNITED STATES OF AMERICA BEFORE FEDERAL TRADE COMMISSION

File No. 1-17310

IN THE MATTER OF RICHARD HUDNUT, A CORPORATION

STIPULATION AS TO THE FACTS AND AGREEMENT TO CEASE AND DESIST

Pursuant to the provisions of the Federal Trade Commission Act (38 Stat. 717; as amended, 52 Stat. 111; 15 U. S. C. A. Sec. 41), the Federal Trade Commission caused an investigation to be made of the methods, acts and practices used by Richard Hudnut, a corporation, in commerce as defined by the Act, and from such investigation has reason to believe that the aforesaid corporation has been or is using unfair methods of competition and unfair and deceptive acts and practices in commerce in violation of the provisions of said Act.

It now appearing that Richard Hudnut is willing to stipulate as to the facts and enter into an agreement to cease and desist from the use of the methods, acts and practices as hereinafter set forth in such agreement, and that the Federal Trade Commission may be willing to accept such stipulation and agreement to cease and desist without prejudice to its right to issue a complaint and institute formal proceedings against the said Richard Hudnut if at any time the Commission shall deem that such action is warranted;

IT IS HEREBY STIPULATED by and between the Federal Trade Commission and Richard Hudnut that the following is a true statement of the facts:

PARAGRAPH ONE: Richard Hudnut is a New York corporation with its principal place of business in the city and State of New York. It now is or has been engaged in the sale and distribution in commerce between and among various states of the United States of cosmetic preparations and, in connection with the sale of said preparations, has engaged in the sale and distribution in commerce, as aforesaid, of a correspondence course of instruction in beauty culture designated as the "Du Barry Success Course" which includes a supply of cosmetics or toiletries for use in connection therewith; causing such cosmetic preparations and material constituting the course of instruction, when sold, to be shipped from its place of business in the State of New York to purchasers in other states. At all times referred to herein said corporation has been in competition with corporations, firms and individuals also engaged in the sale and distribution, in interstate commerce, of similar products.

PARAGRAPH TWO: In the course and conduct of its business as described in Paragraph One hereof, Richard Hudnut, in connection with the sale and distribution of its cosmetic preparations, and of its correspondence course of instruction designated "Du Barry Success Course," together with cosmetics and toiletries included therewith, has disseminated or caused to be disseminated by United States mails or otherwise in commerce as defined by the Federal Trade Commission Act, for the purpose of inducing or which were likely to induce the purchase of said products, or by other means for the purpose of inducing or which were likely to induce the purchase thereof in commerce as aforesaid, certain statements or representations as follows:

"Medical research has proved that overweight (or obesity, as science calls it) is really a disease and as such a serious menace to health, particularly as one grows older. Insurance statistics show that overweight people die younger than those of normal weight. And medical experience has demonstrated that when overweight people suffer from such ailments as high blood pressure, arthritis, and chronic fatigue, a majority of such cases are improved or completely relieved when the weight is reduced to normal.

One girl is known to have corrected a crooked spine, besides becoming a wonderful golfer, by practicing walking correctly from one hole to the next, stretching and straightening her spine, holding the "tuck under" while she waited for her partners to play—all-in-all learning the art of relaxation (the secret of good golf) which correct posture provides.

STAY IN THE BEAUTY ANGLE POSITION for fifteen minutes as you turn this paper over and learn what the Beauty Angle will do for your mind and how it will raise your "Intelligence Quotient".

BRIGHTEN THE BRAIN. Would you like to raise your I. Q.? Take the Beauty Angle before classes.

I was stricken with arthritis in August 1937 and was confined to my bed the last five months of that year, four of which were spent in the hospital. The next six months I just managed to hobble around and after that I walked only when absolutely necessary and avoided steps whenever possible. The inactivity caused me to gain considerable weight and this added to my discomfort in walking.

Today I walk without difficulty and, although the winter was severe, I was not affected. The diets which Miss Delafield prescribed for me contained an abundance of the anti-arthritic Vitamins from which I noticed an immediate favorable reaction. The exercises given were simple and stimulated and developed the unused muscles, improved my circulation and put a spring in my step that I had not had for years. During the Course my weight was reduced from 164 pounds to 134 pounds and my despairing outlook on life disappeared entirely. I feel mentally alert and "young", and important also is the fact that I have learned how and what to eat to maintain my present state of good health, not to mention my streamline figure.

I wish I could tell you how tremendously pleased I have been with the Course. I intend to keep on and on with it, for I notice that if I let go for a day or so I can feel the slump.

The new exercise folder is splendid too. Many thanks.

I think that almost best of all for me is the fact that since going on the diet I have had no asthma. It's something so amazing that I can't quite believe it yet. If it works out over six months or a year you may have found something that most doctors would find invaluable.

I feel fine—look much better and am certainly better able to cope with everything than before. You may count on my being an enthusiastic and loyal customer for the cosmetics and I certainly think the Success Course is a great success.

This diet is essential to beauty because it cleanses the blood stream, puts your whole system in condition.

The juice of six lemons taken daily is really remarkable in correcting a tendency to anemia.

BEAUTY'S BLOTCHES What to do About Them—Skin Eruptions, Pimples . . .

1. Cleanse thoroughly with Special Preparation or DuBarry Soap, which is bland and will not irritate the skin. Use a fresh, sterilized (boiled) washcloth each time. Rinse carefully, first with warm and then with cold water.

2. Apply either Special Astringent or Firming Lotion, with a sterile pad. Pat it on—don't rub. Any infected spot should be dabbed with a separate tiny cotton pad saturated with the astringent. Never carry the pad from a pimple to other parts of the face. Throw it away—do not use it elsewhere on the face.

Wash your face with DuBarry soap and omit all creams and powder until every little pimple is gone.

Authorities now agree that overweight is 100 percent traceable to the fault of overeating.

"80 percent of all disease originates in bad posture." That thought alone should make you work hard to have perfect posture always.

It's believed that the average woman from 35 years of age on has accumulated approximately twenty pounds of mucous or body poisons.

7-DAY SPECIAL ELIMINATION (CLEANSING) DIET.

THERE ARE ENOUGH CALORIES IN THIS DIET SO THAT YOU COULD GO OUT AND DIG DITCHES.

BRITTLE AND RAGGED NAILS are usually caused by a lack of calcium in the diet.

Vitamin A along with D increases your general resistance to infection of the nose and throat. Vitamin A maintains health and luster of enamel on the teeth—It also keeps the skin from becoming too dry and scaly.

Vitamin B improves the muscular tone, nourishes the nerve tissue, including the brain.

Vitamin C maintains health of the teeth and prevents bleeding, receding gums, and pyorrhea. It prevents fatigue and physical weakness.

Vitamin D prevents teeth from decaying and aids the nervous system.

Vitamin G prevents certain forms of dermatitis and assists in preventing certain lesions of the skin.

Only some foods have a poisonous or "acid ash"—some a cleansing or "alkaline ash."

Now, about the foods that have an "acid" or "toxic ash," when you eat too many of these, you get what is termed "an acid ash type of acidosis." Hard on your furnace and, consequently, hard on your looks.

* * * remember that you must always balance your foods so that you don't have too many acid ash or toxic foods in your system.

Now, about the other foods that have a cleansing or "alkaline ash": If you will live on these "alkaline ash" foods mainly—you can be reasonably certain of maintaining a thoroughly cleansed body at all times. You'll have more energy, more of that bouncing vitality that everyone admires, and you should be a lot handsomer, too, all plenteous inducements to stoke your furnace with the proper fuel.

BEFRIEND YOUR GUESTS BY SERVING AT YOUR HOUSE ALKALINE ASH FOODS THAT MAKE FOR VITALITY, BEAUTY, AND GENERAL WELL-BEING, AND NO STOMACH DISTRESS.

It brings you a program for your individual needs—skin, hair, figure, posture, weight—tells and shows you what to do every day for six exciting weeks.

DON'T LET ANYTHING INTERFERE WITH YOUR FOLLOWING THE SPECIAL ELIMINATION DIET TO ELIMINATE ALL ACCUMULATED BODY POISONS

You must eliminate your body toxins by having absolutely perfect intestinal elimination daily.

The cover of an advertising brochure disseminated by said corporation bears the depiction of a woman in a bathing suit accompanied by the statement "Six Weeks from Tonight!" Page 17 of the brochure contains the following statement:

The Girl on the Cover . . . This snapshot . . . was taken in May 1942, the photo on the cover in October 1942.

THREE STEPS OF REDUCTION: ELIMINATIONS—Usually frequent daily eliminations are highly desirable when you are reducing. Some people develop headaches or nausea, or both, when they do not have proper elimination during periods of reducing. Our Salon pupils find liquid Milk of Magnesia, Agarol, or Loraga completely satisfactory "... Our Success School Pupils find taking liquid Milk of Magnesia, Agarol or Loraga each night and drinking the two glasses of water each morning completely satisfactory. If you are in doubt as to what cleansing laxative you should use, consult your physician and have him prescribe for you." The cleansing laxatives mentioned are not habit forming and are relatively harmless, therefore may be taken frequently.

As a matter of fact, the representation that "medical experience has demonstrated that when overweight people suffer from such ailments as high blood pressure, arthritis and chronic fatigue a majority of such cases are improved or completely relieved when the weight is reduced to normal," is misleading insofar as it cannot, contrary to fact, that a reduction in weight can be depended upon to relieve or correct such conditions. Also the representation to the effect that correct walking, stretching, and straightening the spine, relaxation, and correct posture "is known to have corrected crooked spine" is misleading insofar as it causes or has the tendency and capacity to cause the belief or impression that bodily deformity not correctible by a program of posture and exercise can be corrected by following such regime. The "beauty angle position" will not brighten the brain or increase an individual's intelligence quotient. The afore-said testimonial letters, pertaining to arthritis and asthma, likewise are misleading insofar as they unwarrantably import or imply that the recommended regime of diet and exercise are of value in the treatment of either arthritis or asthma.

The diet recommended in said course does not cleanse the blood stream and does not put the whole system in condition. There is no medical basis for the recommendation that the use of lemon juice corrects anemia, therefore the statement that "the juice of six lemons taken daily is really remarkable in correcting a tendency to anemia" is contrary to fact. The regime recommended for skin eruptions and pimples would not constitute a competent treatment for pimples or be effective in correcting all types of skin eruptions or all conditions that are made manifest by the appearance of pimples. The representation that authorities agree that overweight is 100-percent traceable to overeating; that 80 per-

cent of all diseases originate in bad posture; or that "the average woman from 35 years of age on has accumulated approximately twenty pounds of mucuous or body poisons," are contrary to fact.

The representation that there are enough calories in the "7-Day Special Elimination (Cleansing) Diet" to enable one to "go out and dig ditches" is unwarranted, as such diet would supply far less than the calories needed by a person engaged in strenuous physical labor such as ditch digging. Brittle and ragged nails are not usually caused by lack of calcium in the diet. Vitamins A and D cannot be depended upon to increase general resistance to infection of the nose and throat; vitamin A cannot be depended upon to maintain the health and lustre of tooth enamel or keep the skin from becoming dry and scaly; vitamin B cannot be depended upon to improve the muscular tone or to nourish nerve or brain tissue; vitamin C cannot be depended upon to maintain the health of teeth, prevent pyorrhea, prevent gums from bleeding or receding, or prevent fatigue or general weakness; vitamin D does not prevent teeth from decaying and cannot be depended upon to aid the nervous system; and vitamin G cannot be depended upon to prevent dermatitis or assist in preventing lesions of the skin.

The aforesaid references to foods that have "a poisonous or 'acid ash'" and that have "an 'acid' or 'toxic ash'" are misleading insofar as they connote, contrary to fact, that ordinary articles of diet that form an acid ash are poisonous or toxic. The consumption of so-called alkaline ash foods cannot be depended upon to increase energy, vitality, beauty, and well-being, or to result in absence of stomach distress. The representation that said course of instruction "brings you a program for your individual needs—skin, hair, figure, posture, weight" is misleading, as individual or special instruction is not given to all purchasers of such course of instruction. The representations "don't let anything interfere with your following the special elimination diet to eliminate all your accumulated body poisons" and "you must eliminate your body toxins" are misleading insofar as they import or imply, contrary to fact, that the "Special Elimination Diet" will free the body of all accumulated body poisons or toxins.

The statement "Six Weeks from Tonight!" appearing on the cover of the afore-mentioned brochure, in connection with the depiction of a woman thereon (obviously representing that the loss of weight and slenderness indicated by such depiction had been attained in six weeks) is misleading, as a period of time materially in excess of six weeks actually elapsed before the results indicated by such depiction were achieved.

The continued administration of laxative drugs may result in dependence thereon, that is, may tend to create the laxative habit, and representations to the effect that the continued use of laxatives is indicated in connection with the reducing diet should be accompanied by warnings to the effect that such continued use of laxatives may create a dependence upon such drugs. Furthermore, such representations fail to include warnings to the effect that such drugs should not be taken in the presence of abdominal pains, nausea, vomiting or other symptoms of appendicitis.

IT IS HEREBY AGREED by Richard Hudnut, in connection with the sale and distribution in commerce as defined by said Act, or the advertising by the means and in the manner above set forth, of its cosmetic preparations and correspondence course of instruction in beauty culture heretofore designated as "DuBarry Success Course", that it will forthwith cease and desist from representing directly or inferentially:

(1) That a reduction in weight can be depended upon to relieve or correct high blood pressure, arthritis, or chronic fatigue;

(2) That a program of posture and exercise can be depended upon to correct crooked spines or bodily deformities;

(3) That assuming the position described as the "beauty angle position" or any other position of the body will brighten the brain or increase the intelligence quotient;

(4) That the regime of diet and exercise recommended in said course of instruction is of value in the treatment of arthritis or asthma;

(5) That the diet recommended in said course of instruction will cleanse the bloodstream or put the whole system in condition; or that the use of lemon juice corrects anemia;

(6) That the regime recommended for skin eruptions and pimples in said course of instruction constitutes a competent treatment for pimples generally, or is effective in correcting all types of skin eruptions or all conditions made manifest by the appearance of pimples;

(7) That overweight is 100 percent traceable to overeating; that eighty percent of all disease originates in bad posture; or that women generally, over 35 years of age or of any age, accumulate twenty pounds or any other quantity of mucuous or body poisons;

(8) That the "7-Day Special Elimination (Cleansing) Diet" provides the calories required by a person engaged in strenuous physical labor;

(9) That a lack or deficiency of calcium in the diet usually causes brittle or ragged nails;

(10) That vitamins A and D can be depended upon to increase general resistance to infection of the nose or throat; that vitamin A can be depended upon to maintain the health and lustre of tooth enamel or keeps the skin from becoming dry and scaly; that vitamin B can be depended upon to improve the muscular tone or to nourish nerve or brain tissue; that vitamin C can be depended upon to maintain the health of teeth, prevent pyorrhea, prevent gums from bleeding or receding, or prevent fatigue or general weakness; that vitamin D prevents teeth from decaying or can be depended upon to aid the nervous system; or that vitamin G can be depended upon to prevent dermatitis or assist in preventing lesions of the skin;

(11) That the ordinary articles of diet that form an acid ash are poisonous or toxic;

(12) That the consumption of articles of diet that form an alkaline ash can be depended upon to increase energy, vitality, beauty, or well being, or to result in absence of stomach distress;

(13) That individual or special instruction is given to purchasers of such course, unless such individual or special instruction is actually given;

(14) That the "Special Elimination Diet" or any other diet will free the body of all accumulated poisons or toxins.

Said corporation also agrees that it will cease and desist from:

(15) Representing, by the use of the statement "Six Weeks from Tonight!" in connection with an illustration, or depiction, that the slenderness or other characteristic indicated by such depiction had been achieved within a time period of six weeks when, in fact, the characteristic indicated was not achieved in the time indicated; or otherwise from representing that the time in which application to such course of instruction will effectuate any indicated result is less than is actually the fact;

(16) The use of any statement or representation, the effect of which tends or may tend to convey the belief or impression that the continued administration of laxative drugs is indicated for any condition, unless such statement or representation, whenever made, be immediately accompanied in equally conspicuous type by a warning to the effect that the continued use of laxatives may create a dependence upon such drugs; provided, however, that if such statement or representation definitely refers to a laxative product or preparation the label and/or labeling of which bears or contains directions for the use thereof, and which directions for use include an adequate warning that its continued use may create a dependence upon such drug, then in that case the statement or representation first referred to in this paragraph need contain or include only the statement: CAUTION: USE ONLY AS DIRECTED;

(17) Representing, directly or inferentially, that the use of laxative drugs is indicated for any condition unless such representation, whenever made, be immediately accompanied in equally conspicuous type by a warning to the effect that laxatives should not be taken in the presence of abdominal pain, nausea, vomiting or other symptoms of appendicitis; provided, however, that if such representation definitely refers to a laxative product or preparation the label and/or labeling of which bears or contains directions for the use thereof, and which directions for use include an adequate warning of the potential danger to health, as aforesaid, then in that case such representation need contain or include only the statement: CAUTION: USE ONLY AS DIRECTED.

The said Richard Hudnut further agrees not to publish or disseminate any testimonials containing statements or assertions contrary to the terms of the foregoing agreement.

IT IS ALSO STIPULATED AND AGREED that if the said Richard Hudnut should ever resume or indulge in any of the aforesaid methods, acts or practices which it has herein agreed to discontinue, or in the event the Commission should issue its complaint and institute formal proceedings against the respondent as provided

herein, this stipulation as to the facts and agreement to cease and desist, if relevant, may be received in such proceedings as evidence of the prior use by the respondent of the methods, acts or practices herein referred to.

WITNESS the following signatures this ----- day of -----, 19--

RICHARD HUDNUT,
By -----
(Title)
FEDERAL TRADE COMMISSION,
By -----
Chairman.

APPROVED:

FEDERAL TRADE COMMISSION,
By -----
OTIS B. JOHNSON, *Secretary*.

Mr. DAVIS. In that connection, we have a stipulation here involving one of the things that has prompted this bill. It involves the question of cautionary statements. Here is one of them. I am handing it to the reporter for insertion in the record.

(The matter referred to is as follows:)

[Cautionary warning]

UNITED STATES OF AMERICA BEFORE FEDERAL TRADE COMMISSION

File No. 1-15284

IN THE MATTER OF WESTERN MEDICAL CORPORATION, A CORPORATION

STIPULATION AS TO THE FACTS AND AGREEMENT TO CEASE AND DESIST

Pursuant to the provisions of the Federal Trade Commission Act (38 Stat. 717; as amended 52 Stat. 111, 15 U. S. C. A. Sec. 41), the Federal Trade Commission caused an investigation to be made of the methods, acts, and practices used by Western Medical Corporation, a corporation, in commerce as defined by the Act, and from such investigation has reason to believe that the aforesaid corporation has been or is using unfair methods of competition and unfair and deceptive acts and practices in commerce in violation of the provisions of said Act.

It now appearing that Western Medical Corporation is willing to stipulate as to the facts and enter into an agreement to cease and desist from the use of the methods, acts, and practices as hereinafter set forth in such agreement, and that the Federal Trade Commission may be willing to accept such stipulation and agreement to cease and desist without prejudice to its right to issue a complaint and institute formal proceedings against the said Western Medical Corporation if at any time the Commission shall deem that such action is warranted:

IT IS HEREBY STIPULATED by and between the Federal Trade Commission and Western Medical Corporation that the following is a true statement of the facts:

PARAGRAPH ONE: Western Medical Corporation is a Delaware corporation with its place of business in the city of Chicago, state of Illinois. It is now and for some time past has been engaged in the mail-order sale and distribution, in commerce between and among various states of the United States, of medicinal preparations offered as treatments for convulsive seizures commonly known as epilepsy. It has in its employ a Dr. Harry L. James, who, together with two assisting physicians, after professional consideration of the answers supplied in a case history questionnaire filled out by the prospective patient, prescribes an individual treatment, this being followed by periodic reports from the patient as the case develops, in the light of which changes in prescriptions and dosages frequently are made. Said corporation causes its preparations, when thus sold, to be shipped from its place of business in the state of Illinois to purchasers in other states. At all times herein referred to it has been in competition with other corporations and with individuals and concerns engaged in the sale and distribution in interstate commerce of preparations of similar kinds or intended for similar uses and purposes.

PARAGRAPH TWO: In the course and conduct of its business as described in Paragraph One hereof, Western Medical Corporation, in connection with the sale and distribution of its preparations in commerce as defined by the Federal Trade

Commission Act, has disseminated or caused to be disseminated, by United States mails or by other means in commerce, for the purpose of inducing or which were likely to induce, directly or indirectly, the purchase thereof, trade literature, booklets, testimonials, and form letters. Certain of the advertising claims are as follows:

Is it true that you or some one in your family is subject to Epilepsy (Fits) attacks? If so, I would like you to read my enclosed treatise, "The Blood in Epilepsy"—which should give you important information about this treacherous affliction.

As you read my book, I would like to ask you a few important questions to answer in your own mind.

1. Is the medicine you are now taking intended to do ANYTHING MORE than simply hold down your attacks?

2. Is it intended to aid nature in benefiting the system in the endeavor to improve the general physical condition?

3. Is it intended to help defective blood circulation?

4. Is it intended to aid in combating intestinal putrefaction?

Unless you have gone to see a physician who specializes in the treatment of Epilepsy you probably are not taking a combination of medicines that is intended to do these important things just mentioned. You very likely are using a medicine that does no more than just help to hold down the attacks.

To begin with, I feel very confident that I can counteract your attacks almost from the very first day you begin treatment. But in addition to this, the medicines I would choose for your particular case would be selected in the endeavor to aid nature in BENEFITING YOUR SYSTEMIC CONDITION.

WHY OUR METHOD OF TREATMENT IS SO DIFFERENT

In the first place, we have developed many different combinations of treatment because we maintain it is not best to treat Epilepsy attacks with only one kind of medicine. For, IN ADDITION TO COUNTERACTING THE ATTACKS, it is our positive opinion that it is important to try to assist nature in the endeavor to benefit your general condition.

In many cases Epilepsy developed because those afflicted had inherited various bodily weaknesses from past generations. Their parents, grand-parents or great grand-parents may have had severe nervous disorders or diseases such as syphilis, alcoholism, etc. A condition favoring the development of Epilepsy in those susceptible to it may also be brought on by injury, fright, over-study, and by the damaging effect upon the nervous system caused by diseases such as spinal meningitis, typhoid, influenza, pneumonia, and the like, which often permanently weaken the system. Also, diseases during childhood such as convulsions in infancy, scarlet-fever, measles, smallpox, diphtheria, etc., in some cases affect the system and render the person more susceptible to Epilepsy. In still other cases no definite trace can be found of causes that would help to create the nervous and circulatory disturbances to be found in those afflicted with this distressing disease.

Defective Blood Circulation as a Cause

Recent medical findings indicate that DEFECTIVE BLOOD CIRCULATION is a contributing cause of Epilepsy attacks.

In other words, medical findings indicate that DEFECTIVE BLOOD CIRCULATION may be a contributing cause of Epilepsy seizures—both hard and slight attacks.

The Up-to-date Way to Treat Epilepsy Seizures

Since, therefore, it is considered that DEFECTIVE BLOOD CIRCULATION may be a contributing cause of Epilepsy attacks, is it not logical and proper that this condition should be treated in the endeavor to improve it?

In other words, why take medicines which only help hold down the attacks without attempting to improve blood circulation?

Instead of the old-fashioned way of treating Epilepsy attacks, WE PROVIDE MEDICAL TREATMENT THAT IS STRICTLY UP-TO-DATE. By this, I mean each combination of medicines I select according to the symptoms written on patients' Case Histories, contains ingredients which are designed to act on DEFECTIVE BLOOD CIRCULATION as well as to counteract the attacks.

I always use ingredients intended to aid nature in benefiting the general systemic condition. For, in the proper treatment of Epilepsy attacks, it is important that the patient's system be aided to function as normally as possible.

The Need of Combating Intestinal Putrefaction

Among other things given consideration in our method of treatment is 'Intestinal Putrefaction,' because it may often contribute to Epilepsy seizures. Frequently this condition is the source of various types of disorders which have an important bearing upon the general health.

You may be troubled by Intestinal Putrefaction and not know it. Even though the bowels seem to move freely every day, there may be undue retention of intestinal contents which may lead to various disturbances in the system.

Simply Relieving the Attacks Is Not Enough

Thus you see that by including medicines in the effort to assist nature in improving DEFECTIVE BLOOD CIRCULATION, TO REDUCE INTESTINAL PUTREFACTION, and to ASSIST THE BODY TO FUNCTION AS NORMALLY AS POSSIBLE, I am aiming to improve the general systemic condition IN ADDITION TO PROVIDING MEDICINES INTENDED TO COUNTERACT THE ATTACKS.

From the written answers to these questions, I obtain substantially as complete information about any case as though the patient had talked to me personally. The only difference is that when the Case History is mailed to me, the patient has already written the answers for me.

Why I Do Not Require Patients to Have a Physical Examination

Let me explain how I can choose medicines for patients from the information received on Case Histories instead of requiring a personal examination. First of all, Epilepsy, unlike many diseases, cannot definitely be determined by a physical examination. In other words, if a patient went to a physician and did not tell him of the Epilepsy attacks, he could not definitely learn of the trouble even with the most thorough examination, unless the patient had an attack in the doctor's presence. And even when the doctor knows his patient is an Epilepsy sufferer, a physical examination seldom locates anything that might be the actual cause of the trouble.

WHY THE WESTERN MEDICAL CORPORATION METHOD OF TREATING EPILEPSY ATTACKS IS SO REMARKABLE!

The Various Prescriptions Are Given by Dr. James in the Endeavor to Accomplish the Following:

To counteract Epilepsy attacks both hard and slight.

To aid nature in benefiting DEFECTIVE BLOOD CIRCULATION which medical findings indicate to be a contributing cause of Epilepsy attacks.

To better the circulation of the blood in the capillary vessels throughout the body so that the blood can more readily do its work of nourishing and cleansing the system.

To allay nervous manifestations in recognition of the fact that most people with Epilepsy are nervous.

To gently assist in stimulating certain glands of internal secretion in the endeavor to better regulate the bodily functions.

To combat Intestinal Putrefaction which medical findings indicate to be a frequent contributing cause of Epilepsy seizures.

To aid nature in benefiting the whole system and thus to improve the general physical condition.

To aid in giving to the patient a happier outlook on life.

By promptly and clearly answering letters received from patients, Doctor James feels that he can treat patients substantially as well as though they called at his office personally. Furthermore, all patients' Case Histories together with their correspondence and reports are kept on file so that we can keep in close touch with the patients' progress. Thus, this arrangement is perhaps even better than talking to Doctor James because in this way he has a written record of the details of each case.

PARAGRAPH THREE: As a matter of fact, epilepsy is a term which has gained wide usage to express a condition characterized by convulsive seizures, by brief

irregularly recurring periods of unconsciousness not attended by convulsive movements, or by varying combinations of these conditions. The treatment of epilepsy presents many difficult problems.

The above advertising implies that the causes of epilepsy attacks are usually known and in general include inherited bodily weaknesses from past generations due to severe nervous disorders or diseases of ancestors, injury, fright, overstudy and the permanent weakening of the system by certain diseases named—while “in still other cases” no definite trace of the cause can be found. In truth, such undiscoverable causes thus incidentally mentioned are the bases of approximately 80 per cent of all epileptic seizures. In these ideopathic cases the influences which precipitate an individual seizure are no better understood than the fundamental cause of the condition itself. The remaining 20 percent—symptomatic seizures—are due to a large variety of causes which a good physician would locate on personal examination, for example, brain tumor, brain concussion or injury, blood clot, syphilis, toxic conditions, heart deficiency. Many such symptomatic cases may be permanently relieved by proper study and special treatment, while some are not correctable even though the cause of the seizure has been determined.

The statement is without warrant that the respondent's physicians can better determine the nature of the cause or contributing causes of epilepsy attacks on the basis of a written questionnaire than with a physical examination, purportedly because epilepsy “cannot definitely be determined” by such an examination or that by such means the cause is “seldom” located.

The practice universally accepted as proper for epilepsy is to ascertain through personal examination if there is a correctable cause for the seizures, and if so, to institute specific appropriate treatment. Where there is no remedy for the discovered cause or where no cause has been discovered, amelioration of the frequency and severity of the seizures is the best procedure. Treatment depressing the sensitivity of the central nervous system, particularly the fore-brain, usually decreases the number of epileptic seizures and reduces the violence of individual attacks. As long as adequate therapy is continued, cessation of attacks is not infrequently brought about and in some instances the seizures do not return when the sedative drugs are stopped.

The advertising conveys or tends to convey the impression that the physicians of said corporation treat not only the seizures but the causes of epilepsy, especially featuring defective blood circulation and intestinal putrefaction as frequent contributing causes; whereas the drugs prescribed play no role in the correction of the fundamental causes of epilepsy. Furthermore, no attempt is made to determine accurately. If the patient has deficient blood circulation, and no measures are employed to detect if excessive poisonous matters are in the system. The emphasis on “intestinal putrefaction” connotes the fallacious theory that autointoxication results therefrom, to the serious detriment of the patient's health and bodily functioning. The laxatives used by the respondent to clear out so-called intestinal putrefaction will have no effect on either direct or contributing causes of epilepsy.

The medicinal treatments furnished by said corporation are not essentially “different” from those ordinarily prescribed by physicians. No unusual drugs or newly discovered principles are used. In general, its drugs are sedatives—to afford palliative relief from and to reduce the number and severity of the attacks—and laxatives—which bring temporary relief from the physical discomfort of constipation. Included in its prescriptions are drugs dangerous to health if used in too frequent or too large doses or for extended periods of time, such as thyroid extract, zinc phosphide, bromides, laxatives, and phenobarbital—of which hazard no warning appears in the advertising literature. To help avoid injury and promote the acquisition of benefit from said mail order treatments, attention should be called, in the advertising, to the harmful effects of these drugs if not taken in the manner prescribed.

IT IS HEREBY AGREED by Western Medical Corporation that in connection with the offering for sale, sale, and distribution of its medicinal preparations in commerce as defined by said Act, or the advertising thereof by the means or in the manner above set forth, it will forthwith cease and desist from representing, directly or inferentially:

(a) That the method of treatment which it offers for epilepsy is “so different” or otherwise new or uncommon; that the methods followed in general are “old-fashioned” and not up to date; by assertion or implication, that the usual treatment is with “only one kind of medicine,” no attention being given by the physician to the patient's general condition; or that the pros-

pective purchaser has "very likely" been using a medicine that does no more than hold down attacks;

(b) That its method of treatment will "do something more" than simply hold down the attacks of epilepsy, in any manner importing, implying, or conveying the impression that it may be expected to reach and treat the underlying causes thereof;

(c) By statement, implication, or otherwise that the causes of epilepsy are usually known to the respondent's physicians; that in general, such causes are inherited bodily weaknesses from ancestral disorders or diseases, injury, fright, over-study, or a permanent weakening of the system by afflictions such as spinal meningitis, typhoid, influenza, and pneumonia; or by connotation, passing reference, or cursory mention, that the proportion of unknown causes is but incidental or of minor importance;

(d) That deficient blood circulation is or has been found by medical science to be a contributing cause of epilepsy seizures hard or slight; or that the medicines used by it are competent treatments or effective remedies for deficient blood circulation or consequently, for a cause of epilepsy;

(e) That intestinal putrefaction contributes or may contribute to epilepsy seizures, leads to various disturbances in the system, or is the source of disorders having an important bearing upon the general health; or by any means of presentation, that the laxative medicines prescribed will have significant effect on either the direct or the contributing causes of epilepsy;

(f) Directly or by implication, that stimulation of "certain glands" in the body has or may have remedial effect on the cause or contributing causes of epilepsy attacks; or that the medicines used in its treatment do stimulate the internal secretion glands or thereby treat the cause of epilepsy;

(g) That improvement of the general physical condition has or may have any ascertainable effect on epilepsy seizures or their causes; that the normal functioning of the general systemic condition has an "important bearing" in the warding off or correction of epilepsy; or that its medicines constitute competent treatments for the general physical condition or to normalize the systemic functioning of the body;

(h) That from written answers to questionnaires, it does or can obtain substantially "complete" information for the adequate and effective treatment of a case of epilepsy; or that its mail-order treatment is "perhaps even better" than would be a treatment following personal interviews with its physician.

Western Medical Corporation also agrees to cease and desist from—

(i) Disseminating and advertisement or trade literature pertaining to its mail-order treatments where the preparations used in such medication contain:

(1) Thyroid extract, which fails clearly to reveal that said ingredient is a powerful and dangerous drug which attacks, oxidizes, or burns bodily tissues, is apt to be and frequently is harmful to the health of the user, and that the preparation including such drug may be safely taken only on prescription after an examination by a competent physician;

(2) A laxative, which fails clearly to reveal the potential danger thereof in the presence of nausea, vomiting, abdominal pain, or other symptoms of appendicitis;

(3) A bromide, which fails clearly to reveal that the preparation of which it is a part should not be used in excess of the dosage recommended, that such excessive use may be dangerous, causing skin eruptions, mental derangement, and should not be taken by or administered to children;

(4) Zinc phosphide, which fails clearly to reveal that said ingredient may produce phosphorous poisoning, to which the liver and lower jaw are especially susceptible;

(5) Phenobarbital, which fails clearly to reveal that said ingredient may be habit-forming;

Provided, however, That if directions for use of each of said preparations, whether appearing on its label, in the labeling, or in both label and labeling, contain adequate and specific warnings of its potential danger to health as aforesaid, said advertisement need contain only the cautionary statement:
CAUTION, USE ONLY AS DIRECTED.

IT IS ALSO STIPULATED AND AGREED that if the said Western Medical Corporation should ever resume or indulge in any of the aforesaid methods, acts, or practices which it has herein agreed to discontinue, or in the event the Commission

should issue its complaint and institute formal proceedings against the respondent as provided herein, this stipulation as to the facts and agreement to cease and desist, if relevant, may be received in such proceedings as evidence of the prior use by the respondent of the methods, acts, or practices herein referred to.

WITNESS the following signature this _____ day of _____, 1943.

WESTERN MEDICAL CORPORATION,

By _____

(Title)

FEDERAL TRADE COMMISSION,

By _____

Chairman.

APPROVED :

FEDERAL TRADE COMMISSION,

By _____

OTIS B. JOHNSON, *Secretary.*

MR. DAVIS. You gentlemen are fair men. I want you to listen to this and then hear my explanation. Here is what they agree in part not to do: Disseminating any advertisement or trade literature pertaining to its mail-order treatments where the preparations used in such medication contain:

(1) Thyroid extract, which fails clearly to reveal that said ingredient is a powerful and dangerous drug which attacks, oxidizes, or burns bodily tissues, is apt to be and frequently is harmful to the health of the user, and that the preparation including such drug may be safely taken only on prescription after an examination by a competent physician;

(2) A laxative, which fails clearly to reveal the potential danger thereof in the presence of nausea, vomiting, abdominal pain, or other symptoms of appendicitis;

(3) A bromide, which fails clearly to reveal that the preparation of which it is a part should not be used in excess of the dosage recommended, that such excessive may be dangerous, causing skin eruptions, mental derangement, and should not be taken by or administered to children;

(4) Zinc phosphide, which fails clearly to reveal that said ingredient may produce phosphorous poisoning, to which the liver and lower jaw are: especially susceptible;

(5) Phenobarbital, which fails clearly to reveal that said ingredient may be habit-forming.

They have agreed to all of that, signed the stipulation to that effect.

Here is where, as I said, the Commission granted them the very great concession, the great privilege in lieu of setting out all of those things in the advertisement:

Provided, however, That if directions for use of each of said preparations, whether appearing on its label, in the labeling, or in both label and labeling, contain adequate and specific warnings of its potential danger to health as aforesaid, said advertisement need contain only the cautionary statement: Caution, use only as directed.

Here you are dealing with absolutely dangerous medicine, and having the effect which they admit that it has, and yet instead of requiring them to set out those warnings in the advertisement as the Wheeler-Lea amendment authorizes, the Commission permits them to use this cautionary statement, and some of them are so anxious to sell their dangerous nostrums that they do not even want to do that.

And in that connection, gentlemen, the great mass of businessmen are honest and ethical, but there is a certain element of them that

disregards the public interest, persists in disregarding the public interest, and are willing, at the expense of life and health, to sell their dangerous medicines without proper warning, and they are the ones that we have to go after and the ones that we are generally dealing with.

It is argued that that is control of the label by the Federal Trade Commission.

I think that you may see for yourselves that it is not. It is simply said, if you already have got those warnings on your labels, we will not require any more than a statement to put the buyer on notice before he can see those labels.

Mr. REECE. If it does not interfere, I think there is no disagreement as to the procedure which the Commission follows.

It is more with reference to the conclusion.

The Food and Drug Administration has primary responsibility of labels and the writing of necessary cautions in connection with the label to protect the health of the public.

This is the question I want to ask: Does the Commission, when the Food and Drug Administration has approved a label and a caution by its acceptance, of course, I understand it does not give a written approval of a label or a caution on a label, but only a permissive approval; does the Commission then, as a matter of policy, accept that as sufficient to meet the requirement in advertising, "Caution, use only as directed"?

Mr. DAVIS. I will say, generally speaking, that we are in accord, but the Federal Trade Commission is not willing to subscribe to the doctrine that it must be bound in its jurisdiction over advertising by what the Food and Drug decided should be on the label, because we are under oath and it is our responsibility to protect the public against false advertising.

Mr. REECE. There is where it seems to me dual authority and conflict exist. In that way we do have the two agencies dealing with the same subject matter.

Mr. DAVIS. Well, no. I do not agree with you, but I want to say this, that the courts have always held that the Federal Trade Commission had jurisdiction over false advertising, and that labeling is a part of advertising. That has been the universal law and it is still the law.

I read an article in one of these drug magazines the other day calling attention to the fact that a member of the Food and Drug Administration had recently made a speech in Baltimore. This is in the Drug Trade News of November 5, 1945, in which he said that it scrutinizes ads, and that that is not in conflict with the Federal Trade Commission job. Said article states:

The Food and Drug Administration's policy of examining the advertising of a product in reaching a conclusion as to whether its labeling violates the law, as incorporated in the "Rx legend" regulations which became effective October 10, has been followed by FDA ever since the Food, Drug, and Cosmetics Act became effective, according to Assistant Commissioner Charles W. Crawford.

Drug Trade News asked Mr. Crawford to elaborate on the policy after it was discussed at the recent convention of the Maryland Pharmaceutical Association by Dr. Robert P. Herwick, Chief of FDA's Drug Division. Dr. Herwick's discussion created considerable interest—

et cetera.

Mr. Crawford said that there was no conflict; that the principle of incorporation by reference is well recognized, although there have

been no court decisions on it under the Food, Drug, and Cosmetic Act. He and Dr. Herwick pointed out that it is essential that FDA examine advertising of some products to determine whether or not its label statements violate the law. It is perfectly possible for a manufacturer to use vague or ambiguous statements on his labels, relying on advertising to sell the product, they said "this, in fact, has happened already in some instances", et cetera.

That is their theory and they are right about it.

However, an advertisement may be entirely different from the label. In fact, some of the advertising is generally a selling proposition, generally has false claims, we will say, that is, in a case we proceed in, it has false claims of therapeutic effects and safety and various other things that are not touched upon at all in the label. They are two different propositions.

The Food and Drug Administration has its authority, and I favored the bill at congressional hearings, and we have ours. And they are separate and distinct for all practical purposes, and both of them ought to be maintained as they are, and then together they cannot possibly protect the public health, as fully as it should be done.

On the question, however, of any alleged conflict, Dr. Dunbar wrote a letter to Congressman Reece, after his Chief had written a letter condemning this bill, and pointed out alleged conflicts in three or four cases, on the question of whether the doctrine of *res adjudicata* applied. That has been discussed by members of the staff of the Commission, and I am not going to discuss that.

In our effort to avoid any conflict, to avoid any confusion or anything of the kind, because we are dealing with the Food and Drug Administration all the time, we have them to make our analyses and tests, et cetera, for which we pay them out of our appropriation, and so far as I know, are getting along harmoniously with them. They refer advertising to us and we refer labeling to them, although since the passage of the Wheeler-Lea Act, the courts have held that we have concurrent jurisdiction over labeling, as well as other advertising.

Mr. REECE. Are you through with Dr. Dunbar's testimony? If you are through with Dr. Dunbar's letter—

Mr. DAVIS. I am not through with my statement.

Mr. REECE. You referred to Dr. Dunbar's letter as condemning H. R. 2390, and after I read this statement in his letter—

Mr. DAVIS. I did not say he condemned it. I said that he mentioned three or four conflicts.

Mr. REECE. Pardon me. I thought you used the word "condemned."

Mr. DAVIS. I did not say that with respect to Dr. Dunbar.

Mr. REECE. He had this statement in Mr. McNutt's letter, he said:

The bill would at best effect little if any improvement in the confused situation and the attendant impairment of public protection that stem from the basic faults of differing procedures, divided responsibility for determining the truth or falsity of identical representations in labeling and advertising.

And then when I wrote and asked him for an explanation of what he meant, assuming that he wrote the letter which Administrator McNutt signed, he responded with the letter to me to which you refer.

Mr. DAVIS. I am aware that Dr. Copeland and certain representatives of the Food and Drug Administration made a 4- or 5-year fight to have Congress give them jurisdiction over advertising as well as

labeling of food, drugs, and cosmetics, and after it had been considered 4 or 5 years, hearings held both in the Senate and in the House, Senator Wheeler reported for his committee what later culminated in the Wheeler-Lea Act and it was enacted by the Senate practically without opposition, if any at all, it came over here and hearings were held and this committee determined that the course that should be pursued was what was pursued and reported out a bill to that effect, and then it passed that session of the House, and then it passed the Senate, I believe, and then got caught in a jam and did not pass.

Congressman Lea, in the next Congress, again introduced the bill, and, so far as the record shows, it was unanimously reported by the Committee on Interstate and Foreign Commerce, of which Mr. Reece and Congressman Sadowski were both members, and I would like to introduce the Senate and House reports on that bill, which is S. 1077.

And, Mr. Chairman, I would like to introduce them here.

There was not only no dissent to such reports in either branch of Congress, but in the House there was a minority report, or rather they call it "additional views," it was not a minority report, but additional views:

The undersigned members of the committee are heartily in favor of the general purpose of the bill herewith reported, but feel that the proposed new provisions of the Federal Trade Commission Act intended to regulate misleading advertising of food, drugs, devices, and cosmetics fall far short of giving to the consuming public that protection which they are represented as giving and to which the public is fairly entitled.

And that was signed by three members of the House committee, and all of the way through they are arguing for stronger penalties than those provided in the bill.

And then on the floor, the chief discussion ranged around stronger penalties. The speeches made by these and others urging stronger penalties than the bill provided. And then the motion to recommit offered by Congressman Kenney, who was one of those who signed these additional views, was to provide that the Federal Trade Commission should be authorized within its discretion to assess fines, I think, up to \$5,000, against respondents at the same time it issued a cease and desist order against them.

Mr. REECE. Did not the committee state to the House that no dual authority existed? I have a very definite recollection that the committee that worked out the two bills; that is, the Wheeler-Lea Act and the Food and Drug Act, so as to enable the Commission to retain the jurisdiction over advertising in general and even greater powers over advertising relating to food, drugs, and cosmetics, thought it did so in such a way as not to lead to duplication and conflict and gave the House very definite assurance on that.

Mr. DAVIS. I say the record does not bear out that statement.

Mr. REECE. You mean the record does not indicate that we thought we had avoided conflicting jurisdiction?

Mr. DAVIS. Well, I do not know what you mean by that, but it did not take jurisdiction over labeling away from the Federal Trade Commission.

There is evidence of that. Since you have raised the question, when the Lea bill, H. R. 3143, was being considered before the House committee, Congressman Eicher asked this:

Mr. EICHER. Judge Davis, what are your views as to whether or not if this amendment should be adopted, the Federal Trade Act would then contain ample administrative authority to deal with inhibitions against false labeling and so forth that are contained in the pending food and drug bill, if that should become a law?

Commissioner DAVIS. Well, the Commission already has, and has from the beginning, had jurisdiction over all forms of false or misleading advertising in interstate commerce. I mean of articles sold in interstate commerce, no matter how the representations are made, whether they were by newspaper publications or radio, or circular letter, or any kind of distributed circulars or books, letters, or even labels.

That appears on page 58 of the hearings on the Lea bill, February 19, 1937.

Mr. O'HARA. The House or the Senate?

Mr. DAVIS. In the House.

Here is what occurred in the Senate. The following occurred at the Senate hearings on the Copeland bill, S. 2800:

Mr. DAVIS. We assume that it is not expected of this Commission to give any opinions in relation to any feature of the bill as it relates to any other agency, and consequently I shall only discuss it from the standpoint of the jurisdiction of the Federal Trade Commission. As perhaps you are aware, the Federal Trade Commission has jurisdiction over false and fraudulent advertisements (p. 231).

I had been called, received a second call from the chairman of that committee, to appear and state the views of the Federal Trade Commission.

And then later I said:

Well, of course, if Congress desires to transfer the jurisdiction, that is a matter for them. I would not undertake to indicate what they should do in that respect (p. 237).

Senator Copeland stated:

Well, I would not be in favor of that, Judge, because in these competitive conditions you have a very important part to play in this field, outside of the matter of health itself (p. 237).

Later Senator Copeland stated:

I would not be willing to take from you any powers that you now have (p. 238).

Mr. SADOWSKI. You submitted four copies of different cases on stipulations as to the facts and agreement to cease and desist. You have four of them here. They are more or less the same, I presume. One of them is very voluminous.

Would you pick out one of these, and we will put it in the record, just for the information of the committee.

I do not think we would want to put all four of them in.

Just take one of those that you think is the most difficult case.

Mr. DAVIS. I also wanted the one showing that caution which is different from the others; that is, the cautionary statement.

Mr. SADOWSKI. All right; you may submit that.

We do not want to put all those cases in. I think one of them will be sufficient to show the procedure.

Mr. DAVIS. Those you handed me were findings of facts. There is the stipulation, one with and one without the cautionary statement.

How many of these findings of facts do you desire?

Shall I put in all of them?

In that connection, speaking of findings of fact, there was some criticism by some of the witnesses.

Mr. SADOWSKI. I think if you submitted just one of those findings of facts, that would be sufficient.

Mr. DAVIS. I suggest the insertion in the record of the Rigid Steel Conduit Association findings of facts and order.

(The matter referred to is as follows:)

UNITED STATES OF AMERICA, BEFORE FEDERAL TRADE COMMISSION

At a regular session of the Federal Trade Commission, held at its office in the city of Washington, D. C., on the 6th day of June, A. D. 1944

Commissioners: Robert E. Freer, Chairman; Garland S. Ferguson; Charles H. March; Edwin L. Davis; William A. Ayres.

Docket No. 4452

In the Matter of RIGID STEEL CONDUIT ASSOCIATION, AN UNINCORPORATED ASSOCIATION; ITS OFFICERS: HERBERT S. BLAKE, PRESIDENT; LAWRENCE R. QUINN, TREASURER; PAUL WEISS, ASSISTANT HREASURER; ROBERT S. BOOTH, EXECUTIVE SECRETARY; ITS BOARD OF DIRECTORS: T. A. BENNETT, CHAIRMAN; J. M. BARTON; H. G. MORROW; LAWRENCE R. QUINN; H. S. WALKER; A. E. NEWMAN; AND ITS MEMBERS CENTRAL TUBE COMPANY; CLAYTON MARK & COMPANY; COHOES ROLLING MILL COMPANY; ENAMELED METALS COMPANY; FRETZ-MOON TUBE COMPANY, INC.; GARLAND MANUFACTURING COMPANY; GENERAL ELECTRIC COMPANY; LACLEDE STEEL COMPANY; LACLEDE TUBE COMPANY; NATIONAL ELECTRIC PRODUCTS CORPORATION; STEELDUCT COMPANY; TRIANGLE CONDUIT & CABLE COMPANY, INC.; WALKER BROTHERS; YOUNGSTOWN SHEET AND TUBE COMPANY; CORPORATIONS, INDIVIDUALLY AND AS REPRESENTATIVES OF THE MEMBERS OF THE RIGID STEEL CONDUIT ASSOCIATION; GENERAL ELECTRIC SUPPLY CORPORATION; SPANG CHALFANT, INC.; STEEL AND TUBES, INC.; REPUBLIC STEEL CORPORATION; THE M. B. AUSTIN COMPANY; GEORGE L. HATHEWAY; REGINA G. HATHEWAY; KATHERINE R. HATHEWAY; AND JANE HATHEWAY; PARTNERS, TRADING AS CLIFTON CONDUIT COMPANY; CHARLES DONLEY; FRANK C. HODKINSON; ORGANIZATION SERVICE CORPORATION; A CORPORATION, AND ITS OFFICERS: HERBERT S. BLAKE, PRESIDENT; HERBERT S. BLAKE, JR., VICE PRESIDENT; N. MYLES BROWN, VICE PRESIDENT; THOMAS B. JORDAN, VICE PRESIDENT; PAUL WEISS, TREASURER; C. C. GREGORY, SECRETARY; INDIVIDUALLY AND AS REPRESENTATIVES OF THE ORGANIZATION SERVICE CORPORATION; THE NATIONAL ELECTRICAL WHOLESALE ASSOCIATION; AN UNINCORPORATED ASSOCIATION; ITS OFFICERS: J. G. JOHANNESSEN, CHAIRMAN; D. L. FIFE, VICE CHAIRMAN; ALFRED BYERS, SECRETARY; THE MEMBERS OF ITS CONDUIT COMMITTEE: D. L. FIFE; W. S. BLUE; W. J. DRURY; A. H. KAHN; C. H. McCULLOUGH; H. E. RASMUSSEN; H. O. SMITH; L. E. LATHAM; F. R. EISEMAN; W. R. KIEFER; H. B. TOMPKINS; A. L. HALLSTROM; A. S. RIECHMAN; D. M. SMITH; AND ITS MEMBERS: GENERAL ELECTRIC SUPPLY CORPORATION; E. B. LATHAM & COMPANY; FIFE ELECTRIC SUPPLY COMPANY; COLUMBIAN ELECTRICAL COMPANY; GRAYBAR ELECTRIC COMPANY, INC.; W. T. McCULLOUGH ELECTRIC COMPANY; PEERLESS ELECTRIC SUPPLY COMPANY; THE HARDWARE AND SUPPLY COMPANY; REVERE ELECTRIC COMPANY; KIEFER ELECTRICAL SUPPLY COMPANY; WESTINGHOUSE ELECTRIC SUPPLY COMPANY; F. D. LAWRENCE ELECTRIC COMPANY; THE C. S. MERSICK AND COMPANY; INDIVIDUALLY AND AS REPRESENTATIVE OF ALL THE MEMBERS OF THE NATIONAL ELECTRICAL WHOLESALE ASSOCIATION.

FINDINGS AS TO THE FACTS AND CONCLUSION

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on January 25, 1941, issued and subsequently served its complaint in this proceeding upon the respondents named in the caption hereof, charging them with the use of unfair methods of competition in commerce in violation of the provisions of said Act. After the issuance of said complaint and the filing of respondents' answers thereto, testimony and other evidence in support of and in opposition to the allegations of said complaint were introduced before an examiner of the Commission theretofore duly designated by it, and said testimony and other evidence were duly recorded and filed in the office of the Commission.

Thereafter, this proceeding regularly came on for final hearing before the Commission upon the complaint, the answers thereto, testimony and other evidence, report of the trial examiner and exceptions thereto, briefs in support of and in opposition to the complaint, and oral arguments by opposing counsel; and the Commission, having duly considered the matter and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH ONE: (a) Respondent Rigid Steel Conduit Association (hereinafter frequently referred to as RSCA) was an unincorporated voluntary association, the membership of which included the manufacturers of substantially all the rigid steel conduit produced in the United States. It was organized in April 1934 as the immediate successor to the Rigid Steel Conduit Section of the National Electrical Manufacturers Association, the members of which voted to dissolve that section and on the same day organized RSCA. In turn, the Rigid Steel Conduit Section of the National Electrical Manufacturers Association was successor to the Interior Conduit Section of the Associated Manufacturers of Electrical Supplies, which was organized about 1915 and which became the National Electrical Manufacturers Association about 1926. RSCA was organized for the stated general purposes of considering matters of common interest in the manufacture and sale of rigid steel conduit, improving methods of distribution, and collecting and distributing information and data of value to the industry. The first step toward the dissolution of RSCA was taken at a meeting on April 19, 1939, the minutes of which recite in part:

* * * on motion, seconded and carried, it was voted to cease all forms of Association activities, except such as are necessary to close up outstanding commitments and obligations, and place the Association in abeyance, subject to its possible revival in the future, should conditions at a later date indicate the possibility of its functioning successfully in keeping with its originally expressed purposes (Comm. Ex. 35-E).

At a meeting on April 16, 1940, a resolution for the dissolution of RSCA was passed, to be effective as of May 31, 1940. From the time of its organization in 1934 until its formal dissolution it maintained its offices in New York City.

(b) Respondent Herbert S. Blake, an individual, is a lawyer with offices in New York, New York, and as president of respondent Organization Service Corporation is engaged in the management of the affairs of a number of trade associations. In October 1936 he undertook to aid in and direct the affairs of RSCA, and in March 1937 he became president of RSCA and continued in that office until his resignation in April 1939.

(c) Respondent Lawrence R. Quinn, an individual, vice president of respondent Enameled Metals Company, was active in the Interior Conduit Section of the Associated Manufacturers of Electrical Supplies, in the Rigid Conduit Section of the National Electrical Manufacturers Association, and in RSCA, in which at various times he served as treasurer, member of the board of directors, and chairman of the board of directors.

(d) Respondent Paul Weiss, an individual, treasurer of respondent Organization Service Corporation, served as assistant treasurer of RSCA from December 1936 until April 1938 and also supervised and carried on statistical work for RSCA.

(e) Respondent Robert S. Booth, an individual in the employ of respondent Organization Service Corporation, served as secretary pro tem of RSCA from December 1936 to January 1938, when he became executive secretary of RSCA and continued in that capacity until April 1939. During his connection, and that of Organization Service Corporation, with RSCA he supervised and carried on many activities for and in behalf of that association.

(f) Respondent I. A. Bennett, an individual, vice president of respondent National Electric Products Company, was active in the Rigid Conduit Section of the National Electrical Manufacturers Association and took a leading part in the affairs of RSCA. At various times he served as a member of the board of directors of RSCA and as chairman of such board.

(g) Respondent James M. Barton, the individual referred to in the complaint as J. M. Barton, president of respondent Fretz-Moon Tube Company, Inc., was active in and at various times served as a member of the board of directors of RSCA.

(h) Respondent Harry G. Morrow, the individual referred to in the complaint as H. G. Morrow, formerly vice president of respondent Central Tube Company and thereafter connected with respondent Spang Chalfant, Inc., was active in the Interior Conduit Section of the Associated Manufacturers of Electrical Supplies, in the Rigid Conduit Section of the National Electrical Manufacturers Association, and in RSCA. At various times he was a member of the board of directors of RSCA.

(i) Respondent Hervey S. Walker, the individual referred to in the complaint as H. S. Walker, president of respondent Walker Brothers, was active in the Rigid Conduit Section of the National Electrical Manufacturers Association and in RSCA. At various times he served as an officer of RSCA and as a member of its board of directors.

(j) Respondent A. E. Newman, an individual, manager of Wiring Materials Sales of respondent General Electric Company, was active in the affairs of RSCA. He was elected to the board of directors of that association in January 1938, but after attending at least two board meetings declined to accept the position, and on July 13, 1938, the board of directors accepted his resignation.

(k) Respondent Central Tube Company (hereinafter frequently referred to as Central Tube) was a corporation organized under the laws of the State of Pennsylvania, with its principal place of business in Pittsburgh, Pennsylvania. It was engaged in the manufacture and sale of rigid steel conduit until about February 1940, when its assets were purchased by respondent Spang Chalfant, Inc., and thereafter its corporate existence was terminated in November 1940. Central Tube was a member of the Interior Conduit Section of the Associated Manufacturers of Electrical Supplies, a member of the Rigid Conduit Section of the National Electrical Manufacturers Association, and a member of RSCA and participated in its affairs throughout the existence of that association.

(l) Respondent Clayton Mark & Company (hereinafter frequently referred to as Clayton Mark) is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in Evanston, Illinois. It succeeded the Mark Manufacturing Company, which was purchased by respondent Youngstown Sheet and Tube Company in 1923. Clayton Mark discontinued the manufacture of rigid steel conduit about October 1938 and has subsequently sold conduit bearing its own brands which it has secured principally from Youngstown Sheet and Tube Company, and, to limited extent, from respondents Enameled Metals Company and Fretz-Moon Tube Company, Inc. The Marks Manufacturing Company was a member of the Interior Conduit Section of the Associated Manufacturers of Electrical Supplies. Clayton Mark was a member of the Rigid Conduit Section of the National Electrical Manufacturers Association and a member of RSCA and participated in its affairs from the organization of that association until its dissolution.

(m) Respondent Cohoes Rolling Mill Company (hereinafter frequently referred to as Cohoes) is a corporation organized and existing under the laws of the State of New York, with its principal place of business at Cohoes, New York. It is a manufacturer of rigid steel conduit, with a plant capacity of about 800 tons of such conduit per month, and also manufactures other iron and steel products. Its conduit business constitutes but a small part of its total business. About January 1934 Mohawk Tube Company, Inc., successor to Mohawk Conduit Company, was merged with Cohoes. Mohawk Conduit Company was a member of the Rigid Conduit Section of the National Electrical Manufacturers Association, to which membership the Mohawk Tube Company succeeded. The latter became a member of RSCA, in which membership it was succeeded by Cohoes. Cohoes resigned from RSCA, effective July 31, 1938, but its representatives thereafter continued to attend meetings of that association and to take part in association activities.

(n) Respondent Enameled Metals Company (hereinafter frequently referred to as Enameled Metals) is a corporation organized and existing under the laws of the State of Pennsylvania, with its principal place of business at Etna, Pennsylvania. It manufactures rigid steel conduit from pipe purchased from respondent Spang Chalfant, Inc., and has a plant capacity of about 3,000 tons of such conduit per month. It was a member of the Interior Conduit Section of the Associated Manufacturers of Electrical Supplies, thereafter a member of the Rigid Conduit Section of the National Electrical Manufacturers Association, and thereafter a member of RSCA and participated in its affairs until the dissolution of that association.

(o) Respondent Fretz-Moon Tube Company, Inc. (hereinafter frequently referred to as Fretz-Moon) is a corporation organized and existing under the laws of the State of Pennsylvania, with its principal place of business at East Butler, Pennsylvania. It manufactures rigid steel conduit and has a plant capacity of about 1,000 tons of such conduit per month. Its conduit is fabricated in part from pipe produced by itself, in part from pipe purchased from respondent Spang Chalfant, Inc. Its sales of conduit were made exclusively through respondent Steel and Tubes, Inc., a wholly owned subsidiary of respondent Republic Steel Corporation, from January 1934 until about September 1939. At that time Republic Steel Corporation, which owned 50 percent of the voting stock of Fretz-Moon, took over the assets of Steel and Tubes, Inc., including the contract between Fretz-Moon and Steel and Tubes, Inc., and thereafter conduit sales were made by Republic. Fretz-Moon was a member of the Rigid Conduit Section of the National Electrical Manufacturers Association and became a member of RSCA. It resigned from RSCA on October 5, 1939, but continued the payment of dues to RSCA, and its representatives continued to attend meetings and participate in the affairs of RSCA until the dissolution of that association.

(p) Respondent Garland Manufacturing Company (hereinafter frequently referred to as Garland) is a corporation organized and existing under the laws of the State of Pennsylvania, with its principal place of business in Pittsburgh, Pennsylvania. It is successor by change of name to Safety-Armorite Company, which in turn was successor by change of name to Safety Conduit Company, under which name this respondent, one of the earliest producers of rigid steel conduit, entered the conduit business about 1897. Garland has a plant capacity of about 1,400 tons of conduit per month. It was reorganized under the bankruptcy laws and since June 1936 has been under the control of trustees and receivers. Robert Garland formerly president of the company, has been manager for such trustees and receivers. Safety-Armorite Company was a member of the Interior Conduit Section of the Associated Manufacturers of Electrical Supplies, and Garland was a member of the Rigid Conduit Section of the National Electrical Manufacturers Association and of RSCA and participated in the affairs of that association until its dissolution.

(q) Respondent General Electric Company (hereinafter frequently referred to as General Electric) is a corporation organized and existing under the laws of the State of New York, with its principal place of business in Schenectady, New York. Although one of the largest manufacturers of rigid steel conduit, having a plant capacity of about 5,000 tons of conduit per month, that commodity constitutes a very small portion of the total business of General Electric. It was a member of the Rigid Conduit Section of the National Electrical Manufacturers Association and of RSCA. In July 1938 it submitted its resignation to RSCA but continued to participate in the activities of RSCA until approximately the time that association was dissolved.

(r) Respondent Laclede Steel Company (hereinafter frequently referred to as Laclede Steel) is a corporation organized and existing under the laws of the State of Missouri, with its principal place of business in St. Louis, Missouri. For a number of years preceding 1936 Laclede Steel, which manufactures wire and other steel products, had a wholly owned subsidiary, the Laclede Tube Company (hereinafter frequently referred to as Laclede Tube), a corporation organized under the laws of the State of Delaware, which had a plant capacity of about 200 tons of rigid steel conduit per month. In December 1936 Laclede Steel took over the assets of Laclede Tube, and the latter corporation was dissolved. Thereafter, Laclede Steel manufactured, sold, and distributed rigid steel conduit and in general carried on directly the business previously carried on through its subsidiary, Laclede Tube. Immediately after the dissolution of Laclede Tube, Laclede Steel caused the organization of Laclede Tube Company, a Missouri corporation, for the purpose of preserving that name, but this corporation has not actively engaged in any business since its creation. Laclede Tube was a member of RSCA from January 1935 to June 1936, and although no representatives of either Laclede Steel or Laclede Tube attended meetings of the association, they both participated in carrying on the association activities, and Laclede Steel continued to cooperate with RSCA and its members until that association was dissolved.

(s) Respondent National Electric Products Corporation (hereinafter frequently referred to as National Electric) is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at

Ambridge, Pennsylvania. Successor by change of name to National Metal Molding Company, it is one of the largest producers of rigid steel conduit, having a plant capacity of about 5,500 tons per month, and is also engaged on a substantial scale in the production and sale of other products. American Circular Loom Company, a Delaware corporation, was a wholly owned subsidiary of National Electric from about 1914 until its dissolution in January 1937. For a substantial portion of this period it manufactured, sold, and distributed rigid-steel conduit and thereafter sold and distributed under its own brand names conduit manufactured for it by National Electric. Certain of its brands have been continued by National Electric to the present time. National Metal Molding Company and American Circular Loom Company were members of the Interior Conduit Section of the Associated Manufacturers of Electrical Supplies. National Electric and American Circular Loom Company were members of the Rigid Conduit Section of the National Electrical Manufacturers Association and were members of RSCA and participated in its affairs until the dissolution of RSCA in the case of National Electric and until its own dissolution in the case of American Circular Loom Company.

(t) Respondent Steelduct Company (hereinafter frequently referred to as Steelduct) is a corporation organized and existing under the laws of the State of Ohio, with its principal place of business in Youngstown, Ohio. It is engaged in the sale and distribution of rigid steel conduit produced and shipped for it by Enameled Metals. Steelduct was a member of the Rigid Conduit Section of the National Electrical Manufacturers Association and thereafter a member of RSCA and participated in its affairs until the dissolution of that association.

(u) Respondent Triangle Conduit & Cable Company, Inc. (hereinafter frequently referred to as Triangle) is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at Elmhurst, New York. In June 1940, through a merger, it succeeded to the assets and business of Triangle Conduit & Cable Company, Inc., a New York corporation. For several years prior to 1929, Triangle secured its supplies of conduit from Fretz-Moon, but since that date has manufactured its own conduit. It is one of the largest producers of rigid steel conduit, having a plant capacity of about 6,000 tons of such conduit per month, and is also engaged in the manufacture and sale of other products. It was a member of the Rigid Conduit Section of the National Electrical Manufacturers Association and thereafter a member of and active in the affairs of RSCA until the dissolution of that association.

(v) Respondent Walker Brothers is a corporation organized and existing under the laws of the State of Pennsylvania, with its principal place of business at Conshohocken, Pennsylvania. It is a manufacturer of electrical construction materials, including rigid steel conduit, and has a plant capacity of approximately 2,000 tons of conduit per month. It was a member of the Rigid Conduit Section of the National Electrical Manufacturers Association, and thereafter a member of RSCA and participated in its affairs until the dissolution of that association.

(w) Respondent Youngstown Sheet and Tube Company (hereinafter frequently referred to as Youngstown) is a corporation organized and existing under the laws of the State of Ohio, with its principal place of business in Youngstown, Ohio. As a small part of its business, it is engaged in the manufacture of rigid steel conduit and its two plants where this commodity is produced have a productive capacity of about 4,400 tons per month. For a number of years the rigid steel conduit business of Youngstown was carried on through a subsidiary known as the Western Conduit Manufacturing Company, which was a member of the Interior Conduit Section of the Associated Manufacturers of Electrical Supplies. Youngstown was a member of the Rigid Conduit Section of the National Electrical Manufacturers Association and a member of RSCA and participated in its affairs from December 1935 to May 1938. Prior to its becoming a member of RSCA a representative of Youngstown attended meetings of that association as a guest, and subsequent to its resignation from that association Youngstown representatives frequently attended association meetings and served as members of association committees. Youngstown thus participated in the activities of RSCA at times when it was not a member of that association.

(x) Respondent Spang Chalfant, Inc., is a corporation organized and existing under the laws of the State of Pennsylvania, with its principal place of business in Pittsburgh, Pennsylvania. It began the manufacture of conduit in February 1940, when it purchased certain assets of Central Tube and immediately began the operation of the conduit plant thus purchased. It has a productive capacity of about 2,500 tons of conduit per month, but this represents but a small part of

its total business, as it is engaged in the sale and distribution of many other commodities. Spang Chalfant, Inc., was not a member of RSCA. In fact, the association dissolved soon after Spang Chalfant, Inc., acquired the assets of Central Tube in February 1940 and the only association meeting its representatives attended was the meeting of April 16, 1940, at which dissolution was voted.

(y) Respondent Steel and Tubes, Inc., was a corporation organized under the laws of the State of Ohio. It was a wholly owned subsidiary of respondent Republic Steel Corporation until October 1939, when it was dissolved, its assets taken over by Republic Steel Corporation, and its business continued as the Steel and Tubes Division of Republic Steel Corporation. As set out in subparagraph (o) above, Steel and Tubes, Inc., until its dissolution, was the rigid conduit sales agent of respondent Fretz-Moon, and thereafter the Steel and Tubes Division of Republic Steel Corporation was the exclusive sales agent for Fretz-Moon, one-half of the voting stock of which is owned by Republic. Steel and Tubes, Inc., was not a member of RSCA but, nevertheless, its representatives frequently attended meetings of that association and Steel and Tubes, Inc., cooperated with and assisted in the activities of that association and its members.

(z) Respondent Republic Steel Corporation (hereinafter frequently referred to as Republic) is a corporation organized and existing under the laws of the State of New Jersey, with its principal place of business in Cleveland, Ohio. Republic is concerned in the manufacture of rigid steel conduit through its ownership of 50 percent of the voting stock of Fretz-Moon. From 1934 until the dissolution of its wholly owned subsidiary, Steel and Tubes, Inc., in October 1939, it was indirectly engaged in the sale and distribution of conduit, and thereafter, through its Steel and Tubes Division, it was directly engaged in such activities. Through the membership of Fretz-Moon in RSCA and through the activities of Steel and Tubes, Inc., and those of its own Steel and Tubes Division, Republic has cooperated with and assisted in the activities of RSCA and its members.

(1-a) Respondent M. B. Austin Company (hereinafter frequently referred to as Austin) is a corporation organized and existing under the laws of the State of Illinois, with its principal place of business in Chicago, Illinois. It sells and distributes rigid steel conduit which in recent years has been manufactured for it by respondent Triangle but marked with Austin brands. In January 1935 it became a sales agent for Triangle under a purported consignment arrangement by which sales were made at the prices and on the terms specified by Triangle. It presently operates under a contract negotiated with Triangle in November 1939 by which it purchases conduit bearing its brands from Triangle. This contract contains provisions respecting passing on to purchasers any part of discounts, commissions, or allowances received from Triangle under the contract. The provisions of this contract amount in substance to control of Austin's resale prices by Triangle. Though not a member of RSCA, through the relationship to Triangle directly, Austin has cooperated and assisted in the activities of that association and its members.

(1-b) Respondents George L. Hatheway, Regina G. Hatheway, Katherine R. Hatheway, and Jane Hatheway are copartners trading as Clifton Conduit Company (hereinafter frequently referred to as Clifton), with their principal place of business in Jersey City, New Jersey. Clifton sells and distributes rigid steel conduit purchased from General Electric and marked with Clifton brands. Clifton's price announcements conform to those of General Electric. This concern was a member of the Interior Conduit Section of the Associated Manufacturers of Electrical Supplies and applied for membership in the Rigid Conduit Section of the National Electrical Manufacturers Association, but apparently was not accepted because of difficulty over its status as a manufacturer. It was not a member of RSCA but followed many of the practices established or maintained by that association and its members.

(1-c) Respondent Charles Donley, an individual with offices in Pittsburgh, Pennsylvania, is engaged in serving various individuals, firms, and associations as traffic manager or adviser. Mr. Donley furnished railroad freight rate services to various individual conduit manufacturers; for a period of time he prepared and furnished compilations of rates to RSCA for the use of its members in computing delivered prices; and thereafter, with the collaboration and aid of RSCA, furnished such compilations directly to the individual conduit manufacturers. At various times he advised and consulted with RSCA and the transportation committee of that association as to the form of data to be furnished and the scope and manner of its distribution.

(1-d) Respondent Frank C. Hodkinson, an individual of East Orange, New Jersey, was connected with the rigid steel conduit industry in various capacities

from 1897 to 1936. He has been connected with the Safety Conduit Company, Safety-Armortite Conduit Company, Garland, and American Circular Loom Company. His connection as vice president and general manager of the last-named concern was terminated in 1936 when that company was dissolved by its parent, National Electric, and he has not since had any substantial connection with the industry. During his service with the various concerns named, he was active in trade association matters. He assisted in the formation of the Associated Manufacturers of Electrical Supplies, and after the merger of that association with National Electrical Manufacturers Association was at various times a member of its board of governors. During the NRA Code period he was appointed by the board of governors of the National Electrical Manufacturers Association as the supervisory agency of the Roughing-in Classification of the Electrical Manufacturing Industry for the administration of the NRA Code as it applied to rigid steel conduit and other products included in the roughing-in classification. He also served as representative of the American Circular Loom Company at various meetings of RSCA from April 1934 to July 1936.

(1-e) Respondent Organization Service Corporation (hereinafter frequently referred to as OSC) is a corporation organized and existing under the laws of the State of New York, with its principal place of business at 74 Trinity Place, New York, New York. Respondent Herbert S. Blake, an individual, is the president and active head of OSC; respondents Herbert S. Blake, Jr., an individual, N. Myles Brown, an individual, and Thomas B. Jordan, an individual, are vice presidents of OSC; respondent Paul Weiss, an individual, is treasurer of OSC; and respondent C. C. Gregory, an individual, is secretary of OSC. Among the activities carried on by OSC and its officers is that of managing and directing the activities of a number of trade associations and furnishing various services and facilities to such associations. By contract executed October 29, 1936, OSC undertook to manage the affairs of RSCA subject to the association's board of directors, and also undertook to supply RSCA with officers and facilities for the conduct of its affairs. This contract remained in effect until December 31, 1938, and thereafter was reduced in scope and continued until April 1, 1939, when relations between OSC and RSCA ceased. As heretofore found, certain officers and employees of OSC also served as officers of RSCA.

(1-f) Respondent National Electrical Wholesalers Association (hereinafter frequently referred to as NEWA) is an unincorporated trade association of wholesalers and jobbers of electrical supplies, with its offices in New York City. It has a membership of approximately 200 such wholesalers and jobbers who are engaged in the sale and distribution of electrical supplies, including rigid steel conduit, through some 500 establishments scattered throughout most of the States of the United States. In the conduct of its affairs NEWA has various committees, designated as commodity committees, the members of which devote their attention, for the benefit of the entire membership, to particular classifications of electrical material. One such commodity committee is the rigid steel conduit committee. Respondents J. G. Johannesen, D. L. Fife, and Alfred Byers have served as chairman, vice chairman, and secretary, respectively, of the conduit committee, and respondents W. S. Blue, W. J. Drury, A. H. Kahn, C. H. McCullough, H. E. Rasmussen, H. O. Smith, L. E. Latham, F. R. Eiseman, W. R. Kiefer, H. B. Tompkins, A. L. Hallstrom, A. S. Reichman, and D. M. Smith have at various times served as members of such committee. Through the activities of this committee NEWA and its members have cooperated with and assisted RSCA and its members as hereafter set forth.

(1-g) Respondent General Electric Supply Corporation is a corporation organized and existing under the laws of the State of Delaware, with its principal offices in Bridgeport, Connecticut. It is a wholly owned subsidiary of General Electric. Respondent E. B. Latham & Company is a corporation organized and existing under the laws of the State of New York, with its principal place of business in New York City. Respondent Fife Electric Supply Company has its principal place of business at 541 East Larned Street, Detroit, Michigan. Respondent Columbia Electrical Company has its principal place of business at 206 Grand Avenue, Kansas City, Missouri. Respondent Graybar Electric Company, Inc., is a corporation organized and existing under the laws of the State of New York, with its principal place of business in New York City. Respondent W. T. McCullough Electric Company has its principal place of business at 317 First Avenue, Pittsburgh, Pennsylvania. Respondent Peerless Electric Supply Company has its principal place of business at 122 South Meridian Street, Indianapolis, Indiana. Respondent The Hardware and Supply Company has its principal place of business at 475 South High Street, Akron, Ohio. Respondent

Revere Electric Supply Company (the concern referred to in the complaint as Revere Electric Company) is a corporation organized and existing under the laws of the State of Illinois, with its principal place of business in Chicago, Illinois. Respondent Kiefer Electric Supply Company is a corporation organized and existing under the laws of the State of Illinois, with its principal place of business in Peoria, Illinois. Respondent Westinghouse Electric Supply Company is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in New York City. Respondent The F. D. Lawrence Electrical Company has its principal place of business at 217 West Fourth Street, Cincinnati, Ohio. Respondent The C. S. Mersick and Company has its principal place of business at 278 State Street, New Haven, Connecticut. The respondents named in this subparagraph are wholesalers of electrical supplies, including rigid steel conduit. Each is a member of NEWA and representatives of each have at various times served on the conduit committee of that association.

PARAGRAPH TWO: (a) Each of the respondents named in subparagraphs (k) to (1-b), inclusive, of Paragraph One, except as otherwise stated therein, is engaged in the sale and distribution of rigid steel conduit to and through wholesalers, and pursuant to sales made, transports such conduit, or causes it to be transported, among and between various States of the United States and, in some instances, its territories, possessions, and foreign countries, and maintains, and has maintained, a course of trade in rigid steel conduit in commerce, as "commerce" is defined in the Federal Trade Commission Act. These respondents are hereinafter frequently referred to, both individually and collectively, as "conduit sellers."

(b) Each of the respondents named in subparagraph (1-g) of Paragraph One is engaged in the sale and distribution of rigid steel conduit at wholesale, and in the course and conduct of their respective businesses, pursuant to sales made, transports rigid steel conduit, or causes it to be transported, between and among various States of the United States, and maintains, and has maintained, a course of trade in such conduit in commerce, as "commerce" is defined in the Federal Trade Commission Act. These respondents are hereinafter frequently referred to, both individually and collectively, as "conduit wholesalers."

(c) The respondents other than those referred to in (a) and (b) above are not individually engaged in the sale and distribution of rigid steel conduit in commerce but have directed, cooperated with, or assisted conduit sellers or conduit wholesalers in planning and executing the various policies, practices, and methods, as hereinafter set forth. Each of the various conduit sellers and conduit wholesalers is in competition with other conduit sellers and conduit wholesalers to the extent that such competition has not been lessened or restrained by the acts and practices hereinafter described.

PARAGRAPH THREE: Rigid steel conduit (frequently referred to herein merely as conduit) is steel pipe which has been cleaned and galvanized or enameled in order to give it a smooth surface, particularly on the interior of the pipe. Usually made in 10-foot lengths and in sizes having interior diameters ranging from $\frac{1}{4}$ inch to 6 inches, it is installed in buildings and other construction projects where electrical wiring is necessary in order to furnish a continuous channel or container for such wiring. It is ordinarily put in place during the progress of the construction work and wiring is later installed by drawing it through the conduit. Thereafter, such wiring may at any time be withdrawn or supplemented as circumstances may require.

PARAGRAPH FOUR: (a) For a long period of years respondent conduit sellers have used a delivered-price, basing-point system of quoting prices for and selling conduit. The manufacture of conduit had its origin a few years before the beginning of the present century. Several of the pioneer producers of conduit were merely agents of steel companies for the purpose of converting pipe into conduit and distributing it. Safety-Armorite Company and National Metal Molding Company, predecessors of Garland and National Electric, respectively, were converting and selling agents for the National Tube Company, a subsidiary of the United States Steel Corporation. The first price card of the series presently in use to announce prices offered by respondent conduit sellers was issued by these converting agents about August 1, 1913, and was designated as card No. 1. Similar price cards were issued by other conduit sellers then in business. These cards quoted conduit prices in terms of cents per foot and stated the Pittsburgh basing discounts from such prices, with provision for reducing the rate of discount and thus increasing the price according to the railroad freight rate from Pittsburgh to the purchaser's destination. Using card No. 1 of the American

Circular Loom Company of Boston, Massachusetts, as an example (Resp. Ex. 257-A), $\frac{1}{2}$ -inch conduit was quoted at $8\frac{1}{2}$ cents per foot; the Pittsburgh basing discount on jobbers' carloads of galvanized conduit was 60 percent, so that the price delivered in Pittsburgh was \$3.30 per hundred feet. At any destination other than Pittsburgh the discount was reduced at the rate of one-tenth of a point per one cent of railroad tariff rate per hundred pounds. Thus, at a destination having a freight rate of 34 cents from Pittsburgh, the discount would be reduced 3.4 points to 56.6 percent, and the delivered price at such destination would therefore be \$3.60 per hundred feet. This formula does not produce a price difference between Pittsburgh and other points exactly equal to the freight rate.

(b) In 1924, at about the time the steel companies added Chicago, Illinois, as a basing point in the sale of pipe, Youngstown, which had a conduit plant at Evanston, Illinois, announced an Evanston base price for conduit \$4 per ton higher than the Pittsburgh base, and all other conduit sellers announced identical Evanston base prices. Clayton Mark, which established a conduit plant in Chicago in 1924 and began the distribution of conduit therefrom early in 1925, used a Chicago base price instead of an Evanston base. This did not amount to the general establishment of a third basing point, however, because the freight rates from Evanston and Chicago are the same to all points except locations within the Chicago switching district. The discounts from the Evanston and Chicago base prices quoted by all conduit sellers were two points lower than those applicable to the Pittsburgh base and the same provisions for determining delivered prices at other points according to the freight rates were applied as had previously existed with respect to the Pittsburgh base. The formula used also provided that at any given location the delivered price quotation of a conduit seller should be based upon Pittsburgh or Evanston, depending upon which base price and accompanying discount produced the lower figure at the purchaser's destination.

(c) Respondent conduit sellers followed the above-described list-and-discount method of determining delivered prices pursuant to their basing-point system until June 1930, when certain alterations cooperatively determined upon were made in the method of calculating such prices. The minutes of a meeting of the Rigid Steel Conduit Section of the National Electrical Manufacturers Association on June 4, 1930, attended by representatives of American Circular Loom Company, Central Tube, Enameled Metals, Fretz-Moon, Garland, General Electric, Mohawk Conduit Company, National Electric, Triangle, Walker Brothers, and Youngstown show the following action:

The matter of simplified billing of Rigid Conduit along the lines of the plan submitted to Mr. Neagle by Mr. Sicard was discussed and it was the consensus of opinion of the meeting that it is to the best interests of the public and the electrical trade that some such simplified method of net billing be followed (Comm. Ex. 692-Z84).

National Electric issued a booklet dated June 10, 1930 (Comm. Ex. 80-R), entitled "Freight Adders and Terms" containing various tables by the use of which a sum to be added to the base price as a delivery charge per thousand feet of conduit could be determined for a large number of destinations. These sums called "delivery charges" did not represent the exact amount of the freight rate from the controlling basing point to the destination specified, in part because of the manner in which fractions were treated in the calculations and in part because 5 percent was added to and included in such sum. Purchasers who took the discount for payment within the cash discount period were permitted to take such discount upon the delivered price, which included the so-called delivery charge. National Electric also issued price card No. 61 (Resp. Ex. 139-B), dated June 16, 1930, which was prepared for use in connection with the freight adders described above. Other conduit sellers made a similar change from the list-and-discount method of quoting prices. Price card No. 61 of Laclede Tube (Resp. Ex. 306-A to D), effective June 16, 1930, is in all substantial features and in almost all nonessential features a duplicate of the National Electric card. Beginning with card No. 1, all price cards issued by each of the respondent conduit sellers have borne numbers identical with those of the corresponding cards of the other conduit sellers, and the cards of all conduit sellers of any given number have been identical in all material particulars. In some instances individual conduit sellers have not issued a card of a given number and instead have announced a percentage discount from a previous card. Where the issuance of a card was thus omitted, however, the next card issued bore a number coinciding with that borne by corresponding cards of the other conduit sellers.

(d) The modification in pricing method described in the preceding subparagraph was followed by a further change made in the same year. Youngstown prepared a delivery charge booklet dated November 15, 1930 (Comm. Ex. 89), which was more comprehensive and somewhat easier to use than the one devised by National Electric. This booklet, instead of using arbitrary key numbers, set out the delivery charges per thousand feet of each size of conduit according to any railroad tariff rate from one-half cent to \$2.24½ per hundred pounds, in steps of one-half cent each. These delivery charges also included an additional 5 percent, as had been the case with those devised by National Electric. Upon the request of other conduit sellers, Youngstown had copies of its publication printed without covers and sold numbers of them to respondents Cohoes, Triangle, Walker Brothers, Enameled Metals, Steelduct, Steel and Tubes, Inc., Fretz-Moon, Garland, and Clifton. Upon the basis of circumstances shown in the record and a comparison of the pamphlets, it is concluded that Clayton Mark also secured copies of the Youngstown pamphlet. Respondent conduit sellers distributed these pamphlets to their salesmen, sales agents, wholesalers, and other customers, for use by such parties in calculating delivered prices for conduit. At about this time Clayton Mark abandoned the use of a Chicago base and adopted the Evanston base, so that all respondent conduit sellers were then using only Pittsburgh and Evanston as basing points.

(e) The use of the Pittsburgh and Evanston bases exclusively continued until late in 1934, when Clayton Mark again instituted a Chicago base and ceased using Evanston. As heretofore stated, the rates from Chicago and Evanston are the same to all points except a few locations adjacent to these bases. Effective January 2, 1935, Youngstown instituted Chicago as a base and continued the Evanston base (Resp. Ex. 182). The situation thus created had prompt collective consideration. The minutes of a meeting of RSCA on January 17, 1935, recite in part:

(c) The Board of Directors recommends to the Association that the Evanston basing point be eliminated, leaving the two basing points—Pittsburgh, Pa., and Chicago, Ill.

After considerable discussion this recommendation was laid upon the table pending the report of the Special Committee on zoning (Comm. Ex. 3-B).

At the time of this meeting respondent conduit sellers' price cards No. 70, issued in July 1934, were in effect. The next price cards (No. 71) were issued by respondent conduit sellers in January 1936 and were limited to the Pittsburgh and Chicago bases, the Evanston base being eliminated. With the exception of a minor change by which freight adders were shown in terms of hundred feet of conduit instead of thousand feet, respondent conduit sellers have continued their basing-point system without further change. The last proposed change as shown by the record was one considered at a meeting of RSCA on November 16, 1939. The minutes of this meeting do not show that any consideration was given to basing points, but H. H. Benfield, who was present at the meeting as a representative of Fretz-Moon, addressed a memorandum marked "Confidential" to certain of his associates under date of November 20, 1939, in which he described various occurrences at the meeting. He said in part:

Please note this memorandum and destroy.

There was a meeting of the various manufacturers of conduit in New York on November 16th at which all major manufacturers were represented except Triangle.

* * * * *

The fact that neither Youngstown nor Clayton-Marks manufacture conduit in Chicago any more, the dropping of the Chicago base was briefly discussed but it was decided not to do anything about it for the time being because of the possibility of investigation (Comm. Ex. 622-A).

PARAGRAPH FIVE: (a) In the establishment and maintenance through collective action of the basing-point, delivered-price system in its present form, respondent conduit sellers had the purpose of limiting and restraining the normal forces of competition. They recognized that by virtue of location, some conduit sellers could, by reflecting such advantage of location in their prices, exclude others from selling in certain markets; that their basing-point, delivered-price system offered compensations in the form of higher profits to the favorably located seller on sales made in his natural territory in return for refraining from pressing his advantage of location; that in order to maintain a price level high enough to permit each seller to sell in the natural territories of other conduit sellers, price

competition must be restrained; and that the operation of their formula system of pricing enables each seller to quote to a prospective purchaser at any location the same price as that quoted by other sellers, through the use of the same formula, and thus bring about a condition of matched prices. Examples of the knowledge and purpose of these respondents appear in the record in various ways. For example, the president of Garland, in his testimony concerning the basing-point system and the location of Walker Brothers' plant at Conshohocken, only a few miles from Philadelphia, stated:

If we didn't have our present practice, why, Walker would walk away with all the Philadelphia business (T. 1487).

Another example appears in the testimony of the president of Walker Brothers, who, when asked if he knew of any method other than the basing-point, delivered-price system which would afford a similar degree of uniformity in price, stated:

A. Oh, I am not willing to admit that the Pittsburgh basic method of selling is the only way by which uniform prices can be put together. It is one.

Q. Well, can you name other ways in which you could have reached the same degree of identity and uniformity as you did here, through the use of any other method?

A. I imagine that there are a great many other ways of figuring uniform prices outside of the Pittsburgh basic method of selling, but I can't answer your question without distorting the picture. This is one method by which it is done. There must be others (T. 883-84).

(b) Certain aspects of respondent sellers' desire and purpose to restrain competition in the sale and distribution of conduit were openly revealed during the negotiations for and the administration of their Code promulgated under the National Industrial Recovery Act and through various activities claimed to be pursuant to such Code. For example, respondent conduit sellers' Code (Resp. Ex. 259) provided for the filing of prices, discounts, and terms of payment, for the relaying thereof to competitors, and for adherence thereto so long as the filing was not changed. Respondent F. C. Hodkinson who was appointed by the board of directors of the National Electrical Manufacturers Association as supervisory agency for the division of the electrical manufacturing industry which included conduit, in his capacity as such supervisory agency, called upon Garland by letter dated November 29, 1933, for an explanation of an apparent departure from its filed prices in a bid to The Panama Canal. In replying, Garland explained that:

* * * our own price .1547 was in error, inasmuch as we used the 67¢ freight adder which at that time we thought was correct but now find that the less carload freight adder is 70¢, which hereafter will be used by us.
* * * * *

In the prices as quoted some confusion evidently exists as to the proper freight adder as several of the prices are slightly different from the correct which we figure should be .1554 (Comm. Ex. 247).

In replying to Garland, Mr. Hodkinson stated in part:

The filing of price lists, if these lists happen to be uniform, will assure all uniform quotations made on any inquiry, whether from the Government or a private individual, but with the matter of the delivery charges left up in the air as it has been, there is room for differences. I am therefore calling for the filing of these delivery charge schedules (Comm. Ex. 248).

The basis for pricing delayed deliveries of conduit on specific building contracts was determined as shown by the minutes of a meeting of RSCA on January 17, 1935, which read in part:

Upon motion made, seconded, and carried, it was resolved that it is the understanding of each member of the Rigid Steel Conduit Association that any delivery of conduit upon any specific building contract, or order, after its six months expiration, shall be billed on the basis of current filed Card with NRA Supervisory Agency, unless previously an extension has been granted by the Supervisory Agency under the prescribed method of investigation and substantiation of the requirement of extension. And to eliminate confusion, each member shall file a list of all existing contracts on January 25th and February 25th, 1935 (Comm. Ex. 3-B).

In their efforts to maintain identical prices and prevent purchasers from finding any advantage in dealing with one seller as against another, respondent

conduit sellers did not stay within the provisions of their Code. An example of this appears in connection with bids made in February 1935 to the United States for supplying certain conduit for use in the Canal Zone. There were 30 bids submitted: 28 of these were each in the amount of \$3,080; one bid was at a higher figure; and one bid, that of Home Lighting Company, a jobber located in Baltimore, was low at \$3,075. Home Lighting Company received the award and sought to purchase the conduit from Cohoes, which was its regular source of supply. Before the order was shipped Mr. Hodgkinson, in his capacity as supervisory agency under the Code, telegraphed Cohoes under date of March 28, 1935, in part:

REFERRING TO YOUR TELEPHONE MESSAGE WISH TO INFORM YOU THAT AS SUPERVISORY AGENCY I PROTESTED TO WASHINGTON BID SUBMITTED BY HOME LIGHTING COMPANY * * * I HAVE HAD NO REPLY AND BEFORE YOU SHIP THIS SPECIFICATION ON HOME LIGHTING ORDER THE MATTER SHOULD BE ADJUDICATED AT WASHINGTON (COMM. EX. 287).

Under date of March 30, 1935, Cohoes advised Home Lighting Company in part:

We are in receipt of your letter of March 27th, and while we fully appreciate your situation, we are powerless to ship this specification until we have authority to do so from the Supervisory Code Authority (Comm. Ex. 289).

Home Lighting Company sought to purchase the conduit needed to fulfill its obligation under the bid from other conduit sellers. On April 5, 1935, it telegraphed Austin, as follows:

ADVISE WESTERN UNION CAN YOU MAKE SHIPMENT IN FIVE DAYS FIFTY THOUSAND FEET HALF INCH HOT DIPPED CONDUIT (Comm. Ex. 291).

On the same day Austin replied to Home Lighting Company that it could make the shipment, and added:

We sincerely hope to be favored with your order (Comm. Ex. 291).

On the next day, April 6, 1935, Austin advised Home Lighting Company that upon receipt of shipping instructions the order was identified as a Panama Canal bid, that evidently Austin conduit was not specified in the bid and it would be difficult to change the brand with the Government, and concluded by saying:

In view of this being for the Panama Canal I believe it will be very essential that you furnish the brand of conduit nominated in your proposal to avoid complications with the governmental authorities.

We, therefore, regret exceeding that we are unable to handle the order and beg to remain (Comm. Ex. 292).

Home Lighting Company had secured an authorization from the Government purchasing agency on March 23, 1935, to supply Clayton Mark conduit "provided it complies with the specifications" (Comm. Ex. 332). However, Home Lighting Company was unable to purchase the conduit necessary to fulfill its bid. It secured some conduit from other jobbers and the Government purchased the remainder in the open market and charged the difference in cost to Home Lighting Company.

It was impossible for the bid by Home Lighting Company to be in violation of the Code administered by Mr. Hodgkinson because that company was not subject to that Code. In addition, at the time these events occurred, Executive Order No. 6767, dated June 29, 1934, was in effect and provided that in sales to instrumentalities of the Government a price as much as 15 percent below filed prices would not violate Code provisions concerning filed prices.

PARAGRAPH SIX: (a) The use of the same base prices and uniform delivery charge factors by the several respondent conduit sellers will, as a matter of simple mathematics, enable all such sellers to quote identical delivered prices to any given destination, provided the same railroad tariff rate is used by each seller in selecting the applicable delivery charge factor. Frequently, however, it is difficult to exactly determine the tariff rate and even experts sometimes differ as to the applicable rate. Mistakes by conduit sellers in the selection of the railroad tariff rate to be used in a particular instance were a fruitful source of differences in the delivered prices quoted.

(b) The record does not disclose the details of various steps taken by the despondent conduit sellers with respect to railroad tariff rates prior to 1935. In the beginning of the industry the conduit manufacturers who acted as converting and selling agents for pipe manufacturers used a freight bulletin on standard

pipe prepared by National Tube Company. Apparently such rates on pipe were used generally by conduit sellers and no freight bulletin on conduit was published until sometime after the organization of RSCA. During the Code period the problem of price differences resulting from variations in delivery charges was handled by the action of Mr. Hodkinson requiring the filing of delivery charge schedules in connection with the price-filing provisions of the Code. This was supplemented by the action of George A. Sicard, secretary of RSCA, in furnishing a tariff rate for the common use of members of RSCA in cases involving unusual destinations or rates. An example of this appears in the bulletin dated January 31, 1935, addressed by Mr. Sicard to members of the association, concerning bids to be opened February 11, 1935, for 50,000 feet of ½-inch galvanized conduit for The Panama Canal. He wrote:

The published freight rate to Cristobal, Canal Zone, is 47½¢ per hundred pounds (Comm. Ex. 419).

The results on this bid have been heretofore set out in subparagraph (b) of Paragraph Five.

(c) Sometime after its organization and before September 10, 1936, RSCA began the publication of freight rate bulletins for the common use of respondent conduit sellers in conjunction with the delivery charge pamphlets in ascertaining delivered prices to be quoted at the various destinations set out in the rate bulletins. Under date of September 10, 1936, RSCA published a rate bulletin entitled:

SUPPLEMENT TO RIGID CONDUIT FREIGHT RATE BULLETIN, DATED APRIL 25, 1935, TO BE USED AS A BASIS IN DETERMINING DELIVERED PRICES ON RIGID CONDUIT, LESS CARLOAD, FOR RAIL-STATION DELIVERY ALSO STORE-DOOR DELIVERY, INCLUDING ALL TRUCK DELIVERIES FROM PITTSBURGH OR CHICAGO AND EVANSTON TO VARIOUS DESTINATIONS IN WESTERN AND CENTRAL UNITED STATES

(Comm. Ex. 74-Z26)

On October 9, 1936, I. A. Bennett, vice president of National Electric, addressed his sales representatives:

We are in receipt of a copy of letter, dated September 26th, sent out by the Triangle Conduit Company to their Sales Offices in which they enclose copy of the Rigid Steel Conduit Association Supplement on Freight, which takes care of store-door delivery at the rates shown.

This company wants to follow these rates, and charge will be made on all shipments on Pittsburgh or Chicago base where Rigid Conduit is shipped by truck to a job site, or to the store door of jobber.

It is difficult to put into effect any new program as each customer naturally resists paying for something he has been getting for nothing. Therefore, you will unquestionably run up against the story that someone is not doing this or doing that, and therefore, we should not do it.

It certainly seems logical to equalize on freight and transportation service, and therefore, we sent you on October 6th, copies of the Rigid Steel Conduit Association Supplement, and ask that you use this to familiarize your customers, where effective, with this tariff, and endeavor to standardize it (Comm. Ex. 392).

The minutes of a meeting of RSCA on December 8, 1936, recite in part:

Chairman Bennett introduced the subject of the recently published freight supplement for discussion, and certain discrepancies were brought to light in the rates as published.

It was suggested that Mr. Kim confer with Mr. Donely, who compiled the supplement, with a view to having corrected certain errors which had been noted.

Further, it was voted to employ Mr. Donley to keep the supplement up to date in the light of such changes in existing rates as may be made from time to time (Comm. Ex. 9-D).

The last rate bulletin issued directly by RSCA was dated January 1, 1937. Supplements to this rate bulletin, however, were issued directly by the association until the RSCA meeting of September 27, 1937, the minutes of which recite in part:

At a meeting earlier in the year, Chairman Bennett had been authorized to employ Mr. Donley as Traffic Manager for the Association, and, following discussion, it was voted to pay Mr. Donley's bill as submitted to Mr. Booth, and advise him that his services were no longer required.

It was then voted to establish a Committee on Traffic to consist of Messrs. Kim, Welsh and Matthews, of the National Electric Products Corporation, Youngstown Sheet and Tube Company and Central Tube Company respectively (Comm. Ex. 22-D).

The rate bulletin of January 1, 1937, carried as a foreword:

METHOD OF FIGURING DELIVERED PRICE

The freight rates listed herein are to be used to ascertain delivery charges in figuring F. O. B. destination prices to all points in the United States and their possessions.

Where the freight rates shown are from Pittsburgh, Pa., the Pittsburgh basing prices must be used. If the freight rates shown are from Chicago or Evanston, Ill., the Chicago or Evanston basing prices must be used.

For an example: To determine the F. O. B. destination on $\frac{1}{2}$ " Sherarduct Conduit F. O. B. Fort Wayne, Ind.—C/L—Mill Shipment.

Pittsburgh Basing Card 74-----	\$4.67 per 100 ft.
Freight rate 27 cwt. or (delivery charge)-----	.24
	<hr/>
	4.91 per 100 ft.

(Comm. Ex. 79-Z127 and others).

Some of the respondent conduit sellers used and distributed to the trade the bulletins issued by RSCA; and some, of which General Electric is an example, had bulletins separately printed which, though somewhat different in appearance, were identical in material particulars and obviously merely copied from the association bulletins.

(d) The rate bulletins and supplements issued directly by RSCA were prepared by Charles Donley, a traffic and rate expert in Pittsburgh engaged in the business of supplying rate information and other rate and traffic services to various business concerns and trade associations. Mr. Donley had furnished rate services to some of the individual conduit sellers prior to his employment by the association. On July 22, 1937, Mr. Donley addressed a letter to Mr. Booth, who was then acting as secretary for RSCA, with copies to the members of RSCA, in which he referred to his previous services, stated he understood the association would discontinue publication and distribution of a joint schedule, and continued:

May we suggest that it would be to the best interests of the individual members to prepare a freight rate schedule that would be distributed in the name of or by the individual member, such a schedule to contain the freight rates as they are not published, in carload and less carload, and from the origins of Pittsburgh, Chicago, and Evanston to the various destinations and to be published in such form as to reduce the number of pages and then to have it printed, as some of the companies are already doing.

I am also suggesting that this schedule should not contain any reference whatever to the methods of figuring delivered prices and in the place of being prepared and issued by the Rigid Steel Conduit Association, that it be prepared and distributed, as suggested above, by the individual company. I believe if these two changes were made it would be of much more value and of more practical benefit to all who are concerned.

I am taking the liberty of submitting a suggested title page as well as a second page which contains the changed statements from those that are shown in the present schedule. Also a third page giving an idea as to the method of showing the actual freight rates (Comm. Ex. 401-A and B).

Thereafter, Mr. Donley, in compiling and publishing rate bulletins and supplements for the use of conduit sellers which were purchased and paid for individually by conduit sellers, advised and cooperated with Mr. Booth and with

the transportation committee of RSCA. He wrote Mr. Booth, as executive secretary of RSCA, under date of August 11, 1938:

Confirming phone conversation today, wish to advise that our Bulletin of August 3, Subject 7080, Pick-up and Delivery Service Official Territory, was mailed (1 copy only) to all the firms on the list; namely:

M. B. Austin Company, Chicago
 Central Tube Co., Pittsburgh
 Clayton Mark & Co., Chicago
 Cohoes Rolling Mill, Cohoes, N. Y.
 Fretz-Moon Tube, Butler, Pa.
 Garland Mfg. Co., West Pittsburgh, Pa.
 Laclede Steel Co., St. Louis, Mo.
 Nat'l Elec. Prod., Pittsburgh
 Steelduct Company¹, Youngstown
 Triangle Conduit, New York
 Walker Brothers, Conshohocken, Pa.
 Youngstown S. & T., Youngstown, O.

Under date of September 14, 1938, Mr. Donley wrote Mr. Booth as follows:

After you phoned us yesterday we got in touch with Mr. Kim regarding the store door delivery situation about which the Triangle Conduit and Cable Company have written you.

Based on that conversation, we are to submit to the Transportation Committee some figures to show what the approximate cost would be for making the necessary changes in the Rigid Conduit Bulletin. This will be supplied within the next day or so and we will then await advices as to what we should do (Comm. Ex. 385).

Under date of November 24, 1939, Mr. Donley directed the printer as follows:

Enclosed are stickers for mailing revised pages to the rigid conduit schedule.

The following number of copies are to be mailed to respective companies:

Fretz-Moon Tube Co.....	550
The M. B. Austin Co.....	300
Garland Manufacturing Co.....	280
Clayton Mark and Co.....	825
Cohoes Rolling Mill Co.....	600
Youngstown Sheet & Tube Co.....	2200
Triangle Conduit & Cable Co.....	1000
Central Tube Co.....	660
Walker Brothers.....	500
Laclede Steel Co.....	110

(Comm. Ex. 373).

(c) The freight-rate bulletins heretofore described were intended for use and used to provide respondent conduit sellers with common factors in determining delivery charges to be included in the price of conduit delivered at various destinations. They also designated the rate from one or the other of the basing points to each destination, thus indicating the base price applicable at such destination. In determining the controlling base as shown in these bulletins, Mr. Donley used an arbitrary figure of \$4 per ton difference in base prices between Pittsburgh and Chicago, when in fact the difference between these base prices was generally slightly above or below \$4 per ton. These bulletins could not be used for shipping purposes by a conduit seller whose plant is not located in Pittsburgh or Chicago, because those are the only points from which rates are shown in such bulletins. They are not adequate for shipping purposes even for conduit sellers whose plants are in Chicago or Pittsburgh, because they do not contain information affecting rates, such as routing, loading, minimum weights, and other data ordinarily needed for shipping purposes.

(f) The following respondent conduit sellers purchased or otherwise secured and used so-called rate bulletins prepared by Mr. Donley: Central Tube, Clayton Mark, Cohoes, Fretz-Moon, Garland, Laclede Steel, National Electric, Spang

¹ Steelduct Company are furnished with a copy of bulletins of general nature such as the one above mentioned, but they have not been furnished with any Conduit Rate Change Bulletins, as they did not have any printed when the last issue was prepared. Please advise if this firm should be furnished with Conduit Rate Change Bulletins from this office (Comm. Ex. 390).

Chalfant, Inc., Steelduct, Triangle, Walker Brothers, Youngstown, and Austin. Rate bulletins distributed by Enameled Metals are either Donley bulletins or copied therefrom; Laclede Tube used Donley bulletins secured by Laclede Steel; Republic and Steel and Tubes, Inc., used Donley bulletins secured by Fretz-Moon; Clifton copied its bulletins from General Electric, which in turn prepared or copied its bulletins from Donley bulletins. The above finding that Donley bulletins were copied by certain conduit sellers is in part based upon the identity of language, arrangement, destinations, and rates, as appears from a comparison of such bulletins with bulletins known to have been prepared by Mr. Donley.

(g) In preparing and selling the rate bulletins as aforesaid, Mr. Donley knew that they were not intended or adapted for use by the purchasers thereof as bona fide rate information for shipping purposes. He knew that they were intended for use as a common factor in pricing conduit according to a basing-point formula of pricing which included a differential of substantially \$4 per ton between the Pittsburgh and Chicago bases, and he was necessarily aware that the base prices which came to his attention were uniform as among respondent conduit sellers and would, therefore, through the application of a common rate factor, result in identical delivered prices at any given point.

PARAGRAPH SEVEN: Following negotiations covering about two months, RSCA employed Herbert S. Blake and his company, OSC, to manage its affairs. After conferences with members of RSCA and an examination of merchandising policies and practices of conduit sellers, Mr. Blake, in collaboration with RSCA, undertook the formulation and execution of plans having the fundamental purpose of controlling certain conditions which tended to interfere with and disturb the operation of the basing-point, delivered-price system in producing matched price quotations and prices to conduit purchasers. Many of these activities supplementing the pricing system were purported to be carried on in the name of the Robinson-Patman Act, which apparently was viewed by these respondents as a grant of authority for collective action to prevent any departure from uniformity in prices, discounts, terms of sale, and merchandising policies, rather than as being directed toward the preservation of competition for the benefit of the public. The principal matters which were subjects of collective action and were promoted by Mr. Blake and RSCA were the use of consignment contracts, protection contracts, and other means to control distributors and prices, the investigation and control of specific building contracts, so-called closed-transaction inquiries, elimination of warehouses, uniformity of trade discounts, and classification of purchasers.

PARAGRAPH EIGHT: (a) For a long period of time preceding the employment of Mr. Blake and OSC, all the respondent conduit sellers except Clayton Mark sold substantial quantities, and in several instances a major part, of the conduit each handled to and through distributors pursuant to so-called consignment contracts. Little serious effort had been made to enforce price maintenance under these contracts, however, apparently because the distributor agents were obliged to compete with wholesalers who purchased conduit and were at liberty to use their own judgment as to the prices which they quoted. These distributor agents also sold conduit from time to time at prices which did not accurately reflect the use of the basing-point pricing formula. Such price variations had a disturbing influence upon the entire price structure. During the Code period means of controlling the prices at which wholesalers sold conduit were frequently considered. Lack of effective control under the Code was deplored and attention was given to the possibility of securing a uniform policy on this subject by all conduit sellers. The minutes of a meeting of RSCA on April 4, 1935, recite, in part:

The matter of a Sales Agent Contract was discussed at length and upon motion made, seconded, and carried, Messrs. Hodgkinson, Walker, and Sicard were appointed as a Special Committee to consider this matter further (Comm. Ex. 4-B).

(b) It was a part of the plan engaged in by RSCA under the leadership of Mr. Blake to stabilize the price structure in the industry through the general use of consignment contracts which were to be made uniform and enforced according to their terms. Pursuant to this plan, Mr. Blake called upon the association members for copies of their forms of contracts with distributors, analyzed them, and prepared a tentative draft of a uniform consignment contract which was considered and discussed at length by the board of directors of RSCA. The minutes of a meeting of the board of November 20, 1936, recite in part:

It is the intention of the Board of Directors to try and have in the hands of the members a Uniform Jobber Agency Contract, a Uniform Specific Build-

ing Contract, and a set of Fair Trade Practice Rules for consideration of the Association at its next meeting to be held on Tuesday, December 8th, so that the Industry, if it so decides, could put these uniform instruments into operation by our next reporting period—namely, December 25th (Comm. Ex. 8-C).

The minutes of a meeting of RSCA on December 30, 1936, report that it was called to study the "recommendations relative to the Distributor Agents Contracts and other suggested forms in order to enable the manufacturers to adopt them without further delay if they cared to do so" and that Mr. Blake explained a number of changes which had been made (Comm. Ex. 10-D).

(c) One of the necessary steps was to enlist the cooperation and assistance of wholesalers, and this was done. The report of the conduit committee of NEWA on its meeting of September 28, 1936, at which representatives of Central Tube, Fretz-Moon, Laclede Tube, National Electric, Triangle, and Walker Brothers were present, includes the following:

Inasmuch as several manufacturers have expressed the opinion to various members of the Committee that the Conduit Industry can be placed on a sound economic and service basis only by Wholesalers acting as agents for the manufacturers, with consigned stocks, your Committee is of the opinion that this Association should recommend that the Conduit Manufacturers consider the advisability of selling conduit on a consignment basis (Comm. Ex. 39-A).

The regular procedure of the conduit committee of NEWA, referred to above, is for the members of that committee to have a meeting in the morning and this is followed by an afternoon meeting to which representatives of the various respondent conduit sellers are invited.

On January 14, 1937, H. G. Morrow of Central Tube wrote H. S. Walker of Walker Brothers in part:

Speaking for our own company, we are not holding back to see what other people are doing, believing that under Blake's leadership each member of the Association is sincerely in earnest to put his own house in order.

Here is what we have done:

1st—The Board recommended, and the Industry approved, a uniform contract with manufacturers' agents. We sent these contracts out and our agents have all signed them.

2nd—The Board recommended, and the Industry approved, a form of specific building contracts, covering three types. We yesterday OK'd the proofs of these contracts and they will be sent to our district offices this week, to be used in connection with all future jobs.

3rd—Mr. Blake approved an addendum to our regular consigned stock contract which gives the same effect to resale price control as the agency contract which was adopted by the Industry. These forms are now being filled in and will be sent to our district offices this week, for presentation to the jobbers for signature.

4th—Assuming that all the manufacturers are sincere in regard to building contracts, we have acted on Blake's recommendation in the case of all contracts reported to us, with the result that we have already cancelled upward of 900 tons.

5th—The joint meeting of the Board of Governors and some of the other members of the Industry with representatives of the Jobbers' Association, in my opinion, did more to get the jobbers in a frame of mind to cooperate with us than anything we have heretofore done and it is my idea at the next general meeting of the Association, some definite program can be worked out which will be satisfactory to the manufacturers and pleasing to the jobbers.

I think the foregoing accomplishments since the employment of Blake show a very satisfactory rate of progress, in view of the divergent opinions of many manufacturers on certain fundamental problems, to say nothing of the pet peeves which had grown up between manufacturers.

So far as our company is concerned, we are going ahead, in good faith, with this whole program, with the full knowledge that should our competitors not follow an approved program, we can always turn back and make

our marketing conditions conform exactly to those of our competitors (Comm. Ex. 577-A and B).

At a meeting of RSCA on January 27, 1937, Mr. Bennett of National Electric made an extended statement concerning the chaotic conditions which had developed in the industry, referred to the plans made with Mr. Blake and OSC to obtain better results, and stated that he was going to announce a policy to his sales department and customers, with copies to competitors, under which:

* * * It is our intent and purpose to obtain the support of our customers for this policy, and in our program we will establish such trade practices, customs, and forms of contracts as we deem necessary to protect our company from fraudulent manipulation (Comm. Ex. 11-H).

The minutes of the meeting record that thereafter:

There was a lengthy discussion of the various recommendations heretofore made by Organization Service Corporation, during which Mr. Blake stated that he had been informed that Messrs. Garland, Walker, Morrow, Bennett, and Burton [all of whom were present at this meeting] had adopted for their individual companies many of the recommendations.

The discussion brought out the fact that all members were revising their merchandising procedure to include as many of the recommendations as were applicable to their individual needs (Comm. Ex. 11-I).

The report of the conduit committee of NEWA dated May 24-25, 1937, at which meeting representatives of Central Tube, Enameled Metals, Fretz-Moon, General Electric, National Electric, Steel and Tubes, Steelduct, Triangle, Youngstown, and Walker Brothers were present, includes the following:

It is very gratifying that the manufacturers are offering electrical wholesalers an equitable form of sales agency agreement.

Since coming to Hot Springs we have learned that quite a number of wholesalers have, for some reason or another, not executed an agency contract. No one believes the present contract is perfect, but many of us are sure it is better than anything we have had previously. If the present contract is made effective it can be bettered. If it is not supported, it will fail (Comm. Ex. 39-B).

The report of the same committee on its meeting of October 19, 1937, states in part:

On Wednesday morning, October 20, 1937, we had a further meeting at which several of our manufacturer friends entered into our discussions quite freely. More than ever your Committee decided on urging the wholesaler's whole-hearted cooperation in the sales agency plan of selling conduit. Don't abuse the plan by fictitious contracts or amounts of conduit needed. It ought to pay dividends to you in the near future (Comm. Ex. 39-C).

The report of this committee on its meeting of May 23, 1938, attended by representatives of Central Tube, Enameled Metals, Fretz-Moon, General Electric, National Electric, Steelduct, Steel and Tubes, Inc., Walker Brothers, and Youngstown, states in part:

The results of the questionnaires sent out by NEWA a few months ago show that 92% of those replying were of the opinion the sales agency plan for selling conduit represents an improvement over previous methods. The membership also recorded that in most instances manufacturers were cooperating to make the sales agency plan effective (Comm. Ex. 39-D).

The report of the meeting of the conduit committee of May 22, 1939, attended by representatives of Central Tube, Enameled Metals, Fretz-Moon, General Electric, National Electric, Steel and Tubes, Inc., Steelduct, Triangle, Walker Brothers, and Youngstown, recites in part:

While due to a combination of circumstances beyond the control of the manufacturers and wholesalers, the sales agency plan has failed to operate as originally designed, it is the definite desire of both industry groups that the plan be retained as a basis upon which to build a more satisfactory sales picture in connection with our conduit business (Comm. Ex. 40-C).

The conduit committee report of October 17, 1939, attended by representatives of Clayton Mark, Enameled Metals, Fretz-Moon, General Electric, National Elec-

tric, Steel and Tubes, Inc., Steelduct, Triangle, Walker Brothers, and Youngstown, contains the following:

As reiterated on the occasions of our Chicago and Hot Springs meetings, your committee again informed the manufacturers that wholesalers heartily approved the sales agency plan in connection with the distribution of rigid conduit. It is the opinion of your committee that the general situation as it exists today is such that it appears the time is appropriate to give careful and serious consideration to the definite adoption of all the desirable features of this plan, and that the manufacturers study the matter with a view to this end in the reasonably near future. We were pleased during the course of our discussion with the manufacturers to find that their opinions coincide with the thinking of your committee and encouraged to believe some action along these lines might soon be expected (Comm. Ex. 41-A).

(d) Respondents Cohoes, Enameled Metals, Fretz-Moon, Garland, National Electric, Steel and Tubes, Triangle, Walker Brothers, and Austin adopted the Blake form of consignment contract, either without change or with insignificant changes. General Electric, Laclede Tube, Clifton, Steelduct, and Youngstown already had in use forms of consignment contracts which provided for price control, and they continued the use of those forms without adopting the Blake form. Spang Chalfant, Inc., when it entered the conduit business, adopted consignment contracts but not the Blake form.

(e) After the adoption of the uniform consignment contracts, the next logical step was taken to secure maintenance of prices according to the basing-point, delivered-price formula under these contracts. Various forms of pressure were exerted upon both conduit sellers and conduit wholesalers to that end. Among the steps taken was the request of the conduit committee of NEWA that conduit sellers insist that distributors observe the prices specified in the contracts and refuse to supply conduit to those who did not. Herbert S. Blake wrote the various conduit sellers urging that they terminate the contract of any distributor who failed to follow the manufacturer's instructions. Some of the conduit sellers wrote to their distributor agents insisting on full observance of prices. For example, in writing an agent on June 8, 1938, Garland stated in part:

We do not wish to threaten, but we are definitely going to cancel some of our distributor agent's agreements if they do not carry out our instructions, and if they are known as price cutters, it is going to be very hard for them to sign up new agreements with ourselves or others (Comm. Ex. 555).

The RSCA, in connection with reports of price cutting by distributors, wrote conduit sellers that they were responsible for the actions of these distributors and should insist upon distributors maintaining the manufacturers' "published position." Some distributors' contracts were in fact canceled because of their having cut prices.

PARAGRAPH NINE: (a) Electrical contractors are called upon to submit bids for supplying and installing electrical wiring and equipment, and frequently a considerable period of time may elapse between the submission of a bid and the completion of the job. Consequently, such contractors desire protection against an advance in the price of conduit during that interval. It has been customary for conduit sellers, either directly or through their distributors, to protect the price of electrical contractors on specific construction projects. In actual practice those so-called specific building contracts have not amounted to more than options, because the conduit seller does not insist upon the contractor taking the conduit and if there is a price decrease the contractor receives the benefit thereof. The result has been that contractors sometimes entered into contracts with more than one conduit seller, each for the full requirements on a particular job, or took a contract for substantially more conduit than actually needed to complete the job purported to be covered by the contract. Duplicate contracts and excess amounts of conduit provided in contracts were of substantial importance to respondent conduit sellers only after a general increase in the price of conduit. Following a price increase, excess quantities of conduit covered in such contracts in effect constituted a floating supply of conduit available at a lower price. The contractor might transfer such excess to some other job or possibly sell it at a profit. The effect of this floating supply was to create irregular price conditions and to make it difficult for conduit sellers to maintain an advance in price.

(b) The practices existing under the so-called specific building contracts were considered by the conduit committee of NEWA and the report of its meeting of May 4, 1936, recommended:

To correct the waste and unfairness of the building protection contracts your committee recommends: 1. That the manufacturer consider the economic value and the advisability of limiting such contracts to building operations requiring at least one carload of conduit; 2. That efficient means be established to determine the actual amount of conduit required; 3. A bureau or bureaus be established to avoid the waste and unfairness of having so many protection contracts for a given building operation.

Both the manufacturer and wholesaler must, of course, abandon unfair methods to accomplish the desired end (Comm. Ex. 40-A).

Under the leadership of Mr. Blake, as a part of its program to maintain prices and minimize competition in the industry, RSCA undertook the collective preparation of a form of so-called specific building contract to cover sales of conduit to contractors for use on a particular project and the establishment of means for investigating and controlling the use of such contracts. In this program Mr. Blake and RSCA had the cooperation of NEWA.

(c) A draft of a uniform contract was prepared by Mr. Blake through procedure similar to that followed in preparing the uniform consignment contract. The more significant features of this contract form were the detailed identification of the job, including, in addition to its name and location, the name and address of the owner, of the architect or engineer, and of the general contractor; the warranty by the buyer that the conduit will be used only on the job described; the prohibition against diversion; the provision that the price and terms are to be the seller's "regularly published prices and terms as shown by Card No. -- dated -----"; the nonassignability of the contract; and the requirement for a certification by the architect or engineer that the quantity of conduit specified in the contract for the particular job is correct. Clifton, Garland, Enameled Metals, National Electric, Steel and Tubes, Fretz-Moon, and General Electric adopted the Blake form, in some instances with small alterations. Youngstown continued the use of a form of contract previously adopted which, however, contains provisions substantially the same as the Blake form except the certification by the architect. When Spang Chalfant, Inc., entered the industry, it adopted the Blake form. The record does not disclose whether the other respondent conduit sellers did or did not adopt the Blake form.

(d) Arrangements were made by RSCA and OSC for the latter to investigate or arrange for the investigation of the so-called "validity" of specific building contracts. When this activity was initiated, the conduit sellers sent lists of such contracts as they had in force to OSC and thereafter sent copies of new contracts from time to time as they were negotiated. The forms supplied to conduit sellers for the initial reporting called for the following information on each contract: The name of the reporting member, date of contract, location of job, name and address of the contractor, jobber, and architect, amount of conduit, and the price provided in the contract. The filing of copies of subsequent contracts disclosed similar information. Each conduit seller bore the cost of the investigation of the contracts he reported and the results of such investigations were transmitted by Mr. Booth to the reporting conduit seller and such others as were interested in the particular job or inquired concerning it. The nature of the practice is best shown by the history of an investigation of an actual contract. Central Tube reported a contract for 110 tons of conduit for the Teaneck Armory, Teaneck, New Jersey. Mr. Booth reported the result of the first investigation made of this contract to Central Tube on January 14, 1937, which indicated that 110 tons would be required and that Central Tube conduit supplied through Westinghouse Electric Supply Company to Badaracco & Company as contractors would be used. He recommended reinvestigation in 90 days. On October 20, 1937, Central Tube asked that reinvestigation be made. The report of this recheck indicated that the contractor was using both Central Tube and Youngstown conduit and that 80 tons would be sufficient. In advising Central Tube of the result of this recheck under date of June 21, 1937, Mr. Booth stated in part:

If you wish to have me, I shall ask Youngstown how much material they have covered on this job, as I am sure you will both be glad to cut your your allotment in half in view of the card on which taken.

In the meantime, I am marking my records O. K. 80 tons, cancel 30. If you wish me to go into the matter further, please advise (Comm. Ex. 487-I).

The contractor and the agent for Central Tube reassured that 110 tons would be required. Further investigation was made, the result of which showed that the contractor insisted that the full tonnage would be required, while the investigator reported he thought his original estimate of 80 tons would be correct. In reporting this to Central Tube, Mr. Booth wrote in part:

I feel that you should respect our report of June 21st and limit the job to 80 tons or send a representative of your company or make an appointment for a representative of your company and Mr. Lodge to visit the job together but without a representative of the jobber or your New York agents (Comm. Ex. 487-D).

Central Tube gave way to Mr. Booth's insistence and directed its agents, sending a copy of the directions to Mr. Booth:

Do not permit Westinghouse to deliver more than 80 tons against this contract and if after the 80 tons are delivered they need additional conduit we will investigate the matter further (Comm. Ex. 487-B).

(e) This activity was supervised and directed by Mr. Booth, and the collective pressure exerted through him rested in cancellations and partial cancellations of contracts for large quantities of conduit. From time to time during the progress of these investigations Mr. Booth reported to meetings of RSCA the results attained. A cumulative report made by him to the association appears in the minutes of a meeting of RSCA on July 13, 1937, and shows in part that 1,893 contracts were investigated, that these contracts covered 48,509 tons, that cancellation of 27,166 tons resulted, and that the percentage of tonnage canceled to the tonnage investigated amounted to 56 percent (Comm. Ex. 20-H).

PARAGRAPH TEN: (a) The amount and terms of trade discounts to be granted by conduit sellers was the subject of collective consideration by such sellers and conduit sellers was the subject of collective consideration by such sellers and conduit wholesalers. NEWA made studies to determine an average cost of distribution of various electrical goods, including conduit, and made recommendations based thereon concerning the trade discounts or margins which wholesalers should receive. This was followed by the action of I. A. Bennett, chairman of the board of directors of RSCA, in calling a conference between conduit sellers and conduit wholesalers. In extending an invitation to the managing director of NEWA to this meeting, Mr. Bennett stated in part:

The Rigid Steel Conduit Association have authorized the Board of Directors to make a study of the cost of distribution of Rigid Steel Conduit (Comm. Ex. 46).

(b) NEWA called together in New York City the members of its conduit committee for the purpose of attending the joint session with conduit sellers, and then the managing director of NEWA advised the chairman of its conduit committee in part:

Since issuing this call we have learned, however, that the proposed conference between manufacturers and distributors is wider than we had supposed, that, in fact, the manufacturers have invited to be present at the conference various distributors in their individual capacities as well as representatives of various local wholesaler Associations.

Under the circumstances I believe that you will quite agree that the National Association cannot very well take part, through its representatives, in a conference of this kind.

* * * * *

When you adjourn as a Committee, those of you who plan to take part in the proposed conference with manufacturers of Conduit will, of course, attend such a meeting with the manufacturers in your personal and individual capacities and not as official representatives of the National Electrical Wholesalers Association (Comm. Ex. 47).

One of the principal subjects of discussion at the meeting was the costs to wholesalers of doing business as shown in the cost study made by NEWA. The results

of this joint meeting came before RSCA at its meeting of January 27, 1937, and the minutes of that meeting show that L. R. Quinn reported in part:

A brief résumé of what transpired at the meeting of January 6, where various individuals representing manufacturing companies, jobbing companies and jobbers' associations met to discuss putting into effect the request of the the jobbers made at the NEWA convention in Buffalo during October.

* * * * * *

After a thorough analysis of what the various jobbers present had to report, it seemed to be the consensus of opinion that consideration should be given to the various brackets as follows:

6%	-----	for carload and over.
17%	-----	5,000 pounds to carload.
22%	-----	1,000 to 5,000 pounds.
25%	-----	Under 1,000 pounds.

Further, it was suggested that these percentages be based on the Pittsburgh value for each class as published and not include freight (Comm. Ex. 11-E and F).

(c) At the time of the joint conference on January 6th and of the RSCA meeting of January 27th, price cards numbered 74 issued by the various conduit sellers were in effect, quoting only carlot prices on conduit with certain provisions for trade discounts or agent's compensation. The following month respondent conduit sellers issued their price cards numbered 75, and these cards quoted conduit prices in four columns. Using ½-inch galvanized conduit, Pittsburgh base, as an example, the prices per hundred feet were \$4.72 in carlots, \$5.35 on quantities between 5,000 pounds and carlots, \$5.69 on quantities between 1,000 and 5,000 pounds, and \$5.92 on quantities less than 1,000 pounds. The trade discounts or agent's compensation provided by each conduit seller by card No. 75 differed from those previously in effect, but were identical as among the various conduit sellers, and in general outline followed the plan reported by Mr. Quinn as representing the "consensus" of opinion at the meeting of January 6th.

PARAGRAPH ELEVEN: (a) As a further step in their plan for maintaining price uniformity in accord with the pricing plan used in quoting conduit prices, RSCA instituted a system of investigating the prices at which specific sales were made, as well as the prices quoted. When a conduit seller lost an order and suspected that this was the result of a price cut by some one else, he could have an investigation made through OSC which would supply him with the information developed, and the same information was supplied to any other conduit seller who desired it or was interested in the particular transaction. The forms used in requesting, acknowledging, and reporting the results of these so-called "closed transaction" investigations were prepared by Herbert S. Blake and OSC and approved by RSCA.

(b) The real nature of these investigations can best be understood through an examination of a specific instance. On June 30, 1937, National Electric sent to Mr. Booth a tabulation of the bids made to a Philadelphia school district showing the amounts bid by "West Phila. Elec. Sy., Silvers Elec. Sy., Royal Electric, Gold Seal Elec., W. A. Leiser," and stated: "14 Other bidders quoted (Correct Price)," and then set out the prices said to be "correct" (Comm. Ex. 489-C). Under date of July 2, 1937, Mr. Booth acknowledged this on the usual form and sent out form inquiries to conduit sellers identifying the transaction and asking for information as to the connection with the transaction of each concern addressed. As a part of this inquiry he included the actual bids of the parties as reported by National Electric and made the statement:

These are not in accord with card 76. If any of the foregoing are handling your material, you should call this bid to their attention as you will be liable under the Robinson-Patman Act for the failure of these people to maintain your published schedule (Comm. Ex. 489-D and others).

Central Tube replied: "We do not sell any of these jobbers and have not quoted through them"; Cohoes replied that it did not receive the order and stated: "We have advised our jobber that the resale must be maintained especially on all public bids in future"; Enameled Metals reported: "We did not quote"; Steel and Tubes and Fretz-Moon answered: "We do not sell Fretz-Moon to any of these"; Garland, in reporting, inserted the names of the conduit sellers whose materials were quoted on; General Electric replied: "Do not sell them";

Clayton Mark reported that it did not receive the order: National Electric replied: "Do not sell any of those listed"; Steelduct reported: "None handling ours"; Triangle reported: "Unfortunately (maybe) the low bidder is not our baby. We do sell Gold Seal but *not lately*"; Youngstown reported: "Not Youngstown"; and Walker Brothers reported that it received the order "and canceled our contract as per letter attached." The letter of July 2, 1937, from Walker Brothers to the successful bidder advised of the cancellation of the contract because of failure to "observe our prices, selling terms, and other conditions of sale" (Comm. Ex. 490-K). Mr. Booth wrote Walker Brothers on July 21, 1937, and inferred that Walker Brothers should not have supplied the material to West Philadelphia Electric Supply to fulfill its bid. Walker Brothers replied that an unsuccessful effort had been made to get this bidder to withdraw its bid, and stated:

We don't feel that it is good policy to refuse to furnish material on a public bid unless the jobber in quoting reflects a primary price of less than card 76 but we do believe that when a jobber cuts our price and we then should cut him off and in this way teach him to have some respect for our prices without getting ourselves into an inquiry involving the validity of price control (Comm. Ex. 490-M).

On July 26, 1937, Mr. Booth advised National Electric of the results of this investigation, that Walker Brothers had canceled their contract with West Philadelphia Electric Supply, and continued:

Since then I understand that on another public bid, West Philadelphia was right on the line but they no longer have a consigned stock of Walker conduit. They are however, distributor agents for two other manufacturers, so they still have conduit on consigned stock (Comm. Ex. 490-F).

On the same date Mr. Booth similarly advised Garland of the results of the investigation and also said:

I understand that these people also have a stock of your conduit on consignment and hope you will see to it that they do not violate your agreement in any respect. Probably they have learned their lesson (Comm. Ex. 490-C).

(c) Respondent conduit sellers have contended that these "closed transaction" investigations constituted proper activity necessary to enable sellers to secure information as to the condition of the conduit market. The Commission finds, however, that in conception and execution these investigations amount, in fact, to a sophisticated form of price maintenance through united action by means of which a conduit seller who does not maintain prices and require his distributors to do the same is exposed to his associates and to the force of collective pressure, with the effect of tending to prevent departures from the prices established pursuant to the pricing formula.

PARAGRAPH TWELVE: From time to time respondent conduit sellers supplemented the restraining effects of their general practices affecting price by more direct action. The scope and nature of these activities are indicated by many exhibits in the record, among which are those set out below. On October 13, 1937, Garland wrote one of its agents in part:

Yours of October 8th was duly received and we held same over for the reason that we had our Industry Meeting yesterday in Pittsburgh.

* * * * *

The manufacturers are doing their very best to stick to Card 76 on all new business and they believe it can be done. A few of the manufacturers made the statement that they had no difficulty whatever in obtaining Card 76 in the Metropolitan District. This is what we are aiming at, and it is our belief that the New York market will show a decided improvement from now on (Comm. Ex. 541).

On June 7, 1938, Triangle wrote Austin in part:

You received our wire today with regard to the importance of strict adherence to Card 76 prices by all of our conduit distributors.

It is my understanding that there will be a decided improvement in the competitive situation on all makes of conduit. * * * I have talked the matter over with several of our competitors and it is my understanding that they are taking similar action * * * (Comm. Ex. 448).

On June 8, 1938, Enameled Metals wrote a wholesaler in part:

First, we have been assured that the McCarthy Brothers & Ford-Lang deal has been straightened up. At least Youngstown has assured me that it has.

* * * * *

* * * We were directly told that if we wished to have a supply of pipe, we would have to maintain our resale. We have reason to believe that other Manufacturers sent out the same instructions to their agents that we did, and we sincerely trust that on honest effort will be made to hold Card 76. * * * (Comm. Ex. 531-A).

An agent of Garland, in writing to that company under date of June 22, 1938, stated in part:

I attended another meeting of the labeled conduit manufacturers today at the New York Athletic Club. In attendance were Robert Milford, of Steel Duct; Milton Smith, of Enameled Metals; J. Hawks, of Triangle; Newt Walker, of Walker Brothers; and J. Carroll, of National Enameled.

* * * * *

Several projects were discussed as to prices and agreements that had been made, but nothing was pinned on to any of those present, which was in accordance with our agreement to maintain Card 76 on any new projects that might come up after our first meeting (Comm. Ex. 558).

The contract checking and "closed transaction" inquiries carried on by RSCA through OSC and Robert S. Booth were closely interwoven with other price maintenance activities. An example of this appears in an interoffice memorandum by Garland dated July 8, 1937, reading in part:

Booth called up late yesterday afternoon and got me at home. He said that he was telephoning all manufacturers because three or four manufacturers had called him asking his ideas on continuing to sell definite carload orders on the basis of Card 75. He called my attention very definitely to the fact that protection orders of this type, not for Specific Buildings and not covered by Specific Building Contracts, were only good for ninety days; and we were discriminating against other customers if we supplied any of this material. I told him it was my understanding that we had to ship this material before July 1st, and he said that this was true. He then asked me point blank if we intended to ship any more of such carload business, and I told him we were all through with it. * * * (Comm. Ex. 536).

Another instance appears in a memorandum from Mr. Booth to Garland under date of December 27, 1937:

In further connection with the statements made by Mr. Leiser, one of which involved Philip Cass, the report was that Enameled Metals had offered this party 10% inside, beyond card 76. Following is a reply from Major Quinn:

"Philip Cass, although a personal friend of mine, is one of the damnest liars that ever lived. He used to be our customer. We have sold him \$700.00 worth in the last six (6) months. He is apparently buying from Garland. He is always making some kind of statements about what he could buy material for. I insist that the man that made this complaint go back to Mr. Cass and tell Mr. Cass that if he made the statement that we had quoted him a 10% inside, that Mr. Quinn says he is a plain liar. He is probably trying to chisel another Manufacturer. We have made no inside offer of any nature to Mr. Cass or anybody else."

I have already reported to you in connection with the Philadelphia Electric job on which Walker was involved.

I have asked for more definite information as to where Triangle was quoting off card 76 in Philadelphia as claimed by Mr. Leiser; this request having been made on December 22nd.

If you will furnish me with this information, I will be glad to follow through on it (Comm. Ex. 551).

PARAGRAPH THIRTEEN: (a) The members of RSCA, through the medium of that association, engaged in collective activity directed to the classification of customers and to determining, upon the basis of collective opinion, whether or not particular concerns were entitled to be considered and treated as wholesalers. This activity is shown by the record to have been carried on at least as far

back as 1934. Instances of these activities appear in the correspondence of George H. Sicard, then executive secretary of RSCA. Under date of November 23, 1934, Mr. Sicard addressed an inquiry to Mohawk Tube Company, Cohoes, New York, stating the course that should be followed in the case of a particular concern as follows:

Have you put in a consigned stock with the Marshall Field Company in Chicago? If so, I don't see how they can qualify under your jobber's definition. Will you please advise (Comm. Ex. 445)?

A similar instance is shown in Mr. Sicard's letter of December 3, 1934, to the same company:

Are you selling Glen Alden Coal Company, Eastern Pennsylvania as a jobber? I certainly cannot understand if it is so, because they are 100% users.

Will you let me hear from you (Com. Ex. 444)?

Mohawk replied under date of December 4, 1934:

Re Glen Alden Coal Company—

In answer to yours of December 3rd, kindly note we are selling these people as users and not as jobbers (Comm. Ex. 443).

Under date of December 11, 1934, Mr. Sicard addressed inquiries to the members of RSCA reading:

Will you be good enough to advise me whether you consider the Hershey Lumber Company, Hershey, Pa., as a user or as a jobber?

Will you simply answer on the bottom of this sheet, and also I would appreciate it if you would tell me whether this company is one of your customers (Comm. Ex. 440).

On December 30, 1934, Mr. Sicard wrote the members of RSCA:

You will recall that in November I wrote to you asking you for the names of concerns in the New England territory who in your opinion did not qualify as jobbers under the Rigid Steel Conduit Association definition.

I have also received from New England a copy of the list of companies recognized as wholesalers (jobbers) by the Electrical Manufacturers Representatives Club of New England and the Northeastern Electrical Wholesalers Association. This list was compiled jointly by the two associations given above.

From the preliminary investigation it would appear that concerns listed on the attached sheet are considered by some members of the Associations as jobbers, although they do not qualify under the Association definition.

Would you be good enough to tell me by return mail which of these companies you sell and whether you consider them as wholesalers under our definition and why.

When these replies are received I will take the matter up with each of you individually (Comm. Ex. 430).

On February 6, 1935, Mr. Sicard wrote the members of RSCA in part:

The Rigid Steel Conduit Association is extremely anxious to have a definite authentic list of all wholesalers or jobbers in the United States of America.

Will you send me for confidential compilation a list of all your customers to whom you extend jobbers or wholesalers compensation service commissions.

When these lists are received from all of the members, they will be compiled by States and cities. Naturally, no manufacturer's name will be used in connection with any company on such list (Comm. Ex. 413).

On February 20, 1935, Cohoes replied:

In conformity with yours of February 6th we are enclosing list of jobbers (Comm. Ex. 412).

On March 13, 1935, Mr. Sicard addressed the members of RSCA as follows:

The results of the questionnaire regarding Pusey and Jones was that no manufacturer has sold these people. We are investigating further (Comm. Ex. 435).

(b) When RSCA, with the assistance of Mr. Blake, prepared the uniform consignment contract heretofore discussed, a provision was inserted whereby the distributor agent, in executing the contract, represented that he conducted a warehouse suitable for carrying a stock of conduit and accessories in sufficient volume and range of sizes and types adequately to serve the territory in which he operated, that he regularly employed a force of salesmen, and that he did not sell as a contractor or otherwise in significant amounts direct to the general public or to individual ultimate consumers. These provisions reflect the more important qualifications required by NEWA as a prerequisite to membership, but the NEWA definition is in more detailed form. Membership lists of NEWA are available to conduit sellers on request.

(c) After the employment of OSC and Herbert S. Blake, RSCA continued the practice of seeking the collective opinions of its members as a guide to individual conduit sellers in classifying purchasers. This is illustrated in the case of Sanborn Electric Company, of Indianapolis, Indiana. On March 15, 1937, Steel and Tubes, Inc., wrote Fretz-Moon that Clayton Mark recognized Sanborn Electric Company as a wholesaler of conduit and stated that this company was strictly an electrical contractor. Fretz-Moon transmitted this inquiry to R. S. Booth, secretary of RSCA, who, on March 22, 1937, sent a questionnaire to members of RSCA, as follows:

Subject: SANBORN ELECTRIC COMPANY, INDIANAPOLIS, INDIANA.

I have been asked to ascertain the status of the above company; that is, whether they are treated as Wholesalers or Contractors.

Please reply hereon, returning this sheet to me stating how you treat this company (Comm. Ex. 491-C and others).

The record contains the replies received from Central Tube, Cohoes, Enameled Metals, Garland, General Electric, Clayton Mark, National Electric, Steelduct, Triangle, Walker Brothers, and Youngstown. Mr. Booth, under date of June 24, 1937, advised Fretz-Moon as follows:

Sometime ago you sent me a memorandum from Steel & Tubes covering the status of Sanborn Electric Co., Indianapolis, Ind.

The report was that Clayton Mark Co. recognized Sanborn as a wholesaler whereas in the opinion of Steel & Tubes they are strictly electrical contractors.

This inquiry was sent to all members in addition to Clayton Mark and it is the opinion of the majority that they are contractors but Clayton Mark claims that his Jobber Purchase Agreement contract covers this situation and if any part of their sales is on other than a wholesale basis, they settle at the contractor's price.

There is some justification apparently in the position he takes as you will note from Mr. Walker's reply that the Directory of the Wholesalers Magazine states that these people do about 70% wholesaling. A majority of these dual accounts are very bothersome and I presume they will continue to be.

You will notice that no reply is enclosed from Laclede. However Mr. Oberhauser informed me yesterday by telephone that he knew nothing about this transaction.

Kindly return the papers to me when you are through with them with any comment you may care to make (Comm. Ex. 491-A).

PARAGRAPH FOURTEEN. It was formerly the practice of conduit sellers to maintain warehouse stocks of conduit in many large cities. They made shipments of conduit to such stocks in carload lots and reflected the benefit of the lower carload freight rate in the price on warehouse sales of less-than-carload quantities of conduit to small wholesalers. This practice was a source of dissatisfaction to large wholesalers who were able to buy in carlot quantities but secured no advantage thereby in their competition with small wholesalers who purchased in small quantities from warehouse stocks of conduit sellers. In addition to objections by large wholesalers to that practice, the maintenance of such warehouse stocks created competitive difficulties among conduit sellers. By means of collective action, with the aid and cooperation of NEWA, respondent conduit sellers were able to, and did, discontinue the maintenance of warehouse stocks except on the Pacific Coast. Some of the activities of respondents concerning warehousing are indicated in the extracts from the record which follow. The report of the conduit committee of NEWA on its meeting of May 4, 1936, in dis-

cussing unsatisfactory conditions in the conduit business, attributed them in part to "manufacturers' uneconomic local warehouse stocks" and said in part:

Last year your committee recommended "the discontinuance of manufacturers' local warehouse stocks for the reason, among others, that sales and deliveries out of these stocks through warehouses or through agents result in unfair price discrimination against those wholesalers who do their own warehousing and otherwise perform the full distribution service for the manufacturer" (Comm. Ex. 40-A).

The report of the conduit committee of its meeting of September 28, 1936, recites in part:

It is very gratifying to your Committee to be able to state that manufacturers have discontinued local warehouse stocks in all sections of the country except the Pacific Coast. * * * (Comm. Ex. 39-A).

On May 25, 1937, Triangle wrote Austin in part:

* * * it is the general feeling today that once the bars are let down, even in Chicago, warehouses will return generally.

However, we will look into it, feel out our good friends again, and see what can be done. The only argument we have is that Chicago is a basing point, and the only way the whole thing can be worked out is for all companies, in view of Chicago being a basing point, to have a Chicago factory stock to take care of the Chicago basing point territory. There is one thing certain. I cannot get an edge for you in this matter, that is, if you do it I am sure that others will follow. However, let me look into it again (Comm. Ex. 526).

On June 17, 1938, I. A. Bennett of National Electric wrote to W. J. Drury, of Graybar Electric, who was then a member of the conduit committee of NEWA, and stated in part:

The Youngstown Sheet and Tube Company and Triangle Conduit and Cable Company, both have local stocks of Rigid Conduit in the Chicago District.

This is the beginning of the opening of manufacturers' warehouse stocks, which have been eliminated everywhere except on the Pacific Coast. * * * (Comm. Ex. 603).

In September 1938 the rumored reinstitution of warehouse stocks was being investigated by RSCA. The minutes of an association meeting at that time show:

Mr. R. M. Garland stated that he had reports that warehouses were being established in various parts of the country, whereupon, Mr. Booth stated that he was investigating several reports which had come to him in this connection, but that his investigation was not complete at the present time (Comm. Ex. 34-Z2).

The conduit committee of NEWA, reporting on its October 18, 1938, meeting, attended by representatives of American Circular Loom Company, Inc., Austin, Central Tube, Enameled Metals, Fretz-Moon, General Electric, National Electric, Steel and Tubes, Inc., Steelduct, Walker Brothers, and Youngstown, said in part:

Much to the dismay of your Committee, information was presented to the effect that there is the possibility of a trend toward the reestablishment of manufacturers' local warehouse stocks in the key cities of the country. In at least one case this has become an accomplished fact. It was the very definite expression of manufacturers present at our meeting that the establishment of such local stocks was highly undesirable from an economic point of view. However, it was pointed out in no uncertain terms that if one or two manufacturers determined on such a policy it is quite obvious that others must in due course follow suit. It is the most apparent issue in this report that the wholesaler urge upon his respective suppliers a continuation of the policy of not establishing local warehouse stocks as being economically unsound, tending to duplicate stocks, and an unnecessary expense and waste (Comm. Ex. 39-E).

The reports of the meetings of the conduit committee of May 22, 1939, and October 17, 1939, contain statements similar to that appearing in the report of May 20, 1940, which reads in part:

The manufacturers continue to express entire satisfaction with the economies resulting from the discontinuance of their local warehouse expense, and reiterate their liking for wholesaler warehousing as now in operation, thereby eliminating the unnecessary waste of additional expense involved in local warehouse stocks (Comm. Ex. 42).

PARAGRAPH FIFTEEN: (a) Through the use of the basing-point, delivered-price formula, supplemented by the use of common delivery charge factors and common freight rate books to aid in reducing and eliminating price differences which might arise through the individual calculation of freight rates and the conversion of such rates from terms of cents per hundred pounds to cents per hundred feet of conduit of any given size, respondent conduit sellers have been able to achieve a substantial degree of delivered price identity in quoting and selling conduit. The effectiveness of respondents' formula is illustrated in the record in several ways. The following examples taken from public bids show varying degrees of uniformity.

Bids to The Panama Canal for supplying 111,000 feet of conduit f. o. b. Cristobal or Balboa, Canal Zone, were opened June 17, 1935, and were as follows:

American Elec. Supply Company-----	\$8, 188. 90	5%	10 days
M. B. Austin Company-----	8, 188. 90	5%	10th proximo
Baltenger Electrical Co., Inc-----	8, 188. 90	5%	15th proximo
Philip Cass Co-----	8, 188. 90	5%	10th proximo
Central Tube Company-----	8, 188. 90	5%	10th proximo
Clayton Mark & Co-----	8, 188. 90	5%	10th proximo
Enamel Metals Company-----	8, 188. 90	5%	10th proximo
Gaffney Kroese Electric Supply Co-----	8, 188. 90	5%	10th proximo
Garland Manufacturing Company-----	8, 188. 90	5%	10th proximo
Gertler Electric Supply Corp-----	8, 188. 90	5%	10th proximo
Graybar Electric Company-----	8, 188. 90	5%	10th proximo
Grene Wolf Co., Inc-----	8, 188. 90	5%	15th proximo
Home Lighting Co., Inc-----	8, 188. 90	5%	10th proximo
Hudson Electric Supply Company-----	8, 188. 90	5%	10th proximo
Laclede Tube Company-----	8, 147. 70	5%	10 days
Lavenson & Savasta-----	8, 188. 90	5%	10th proximo
Lee Electric Co-----	8, 188. 90	5%	10th proximo
Loman Electric Supply Co-----	8, 188. 90	5%	10 days
National Electric Products Corp-----	8, 188. 90	5%	10th proximo
Noland Company, Inc-----	8, 188. 90	5%	15th proximo
Shell Electric Supply Corp-----	8, 188. 90	5%	10 days
Thomas Summerville Co-----	8, 188. 90	5%	10th proximo
Steel and Tubes, Inc-----	8, 188. 90	5%	10 days
Steelduct Company-----	8, 188. 90	5%	10th proximo
			after shipment
Triangle Conduit & Cable Co., Inc-----	8, 188. 90	5%	10th proximo
U. S. Electric Export Corp-----	8, 188. 90	5%	10th proximo
Walker Bros-----	8, 188. 90	5%	10th proximo
Weinstein Supply Company-----	8, 188. 90	5%	10 days
West Philadelphia Electric Supply Co-----	8, 188. 90	5%	10th proximo
Westinghouse Electric Supply Co-----	8, 188. 90	5%	10th proximo
Youngstown Sheet & Tube Co-----	8, 188. 90	5%	10th proximo
Baltimore Electric Supply Co-----	8, 188. 90	5%	10th proximo
National Electric Supply Co-----	8, 188. 90	5%	15th proximo

(Comm. Ex. 318.)

In the above instance, 12 respondent conduit sellers submitted bids. Austin, Central Tube, Clayton Mark, Enameled Metals, Garland, National Electric, Steel & Tubes, Inc., Steelduct, Triangle, Walker Brothers, and Youngstown each bid \$8,188.90, and Laclede Tube bid \$8,147.70, but under a policy of disregarding bids which did not comply with the invitation, the award was made by lot.

Bids on 100,000 feet of conduit for The Panama Canal opened January 6, 1938, were as follows:

American Electric Supply Co.	\$6,200.00	5%	10th proximo
M. B. Austin Company	6,200.00	5%	10th proximo
Baitinger Electric Company, Inc.	6,200.00	5%	10th proximo
Enameled Metals Company	6,200.00	5%	10th proximo
Gaffney Kroese Electric Company	6,200.00	5%	15th proximo
Garland Manufacturing Company	6,200.00	5%	30 days
Germantown Electric Supply Co.	6,200.00	5%	15th proximo
Gertler Electric Supply Corp.	6,200.00	5%	20 days
Gold Seal Electric Supply Co.	6,200.00	5%	
Graybar Electric Company, Inc.	6,200.00	5%	10th proximo
Greene Wolf Company, Inc.	6,000.00	2%	10 days
Laclede Steel Company	6,200.00	5%	10th proximo
E. B. Latham & Company	6,200.00	5%	10th proximo
Loman Electric Supply Company	6,200.00	2%	10th proximo
Louis Electric Corporation	7,000.00	2%	10 days
Clayton Mark Company	6,200.00	5%	10th proximo
National Electric Products Corporation	6,200.00	5%	10th proximo
Noland Company, Inc.	6,200.00	5%	10th proximo
Shell Electrical Supply Corp.	6,200.00	5%	10 days
Steelduct Company	6,200.00	5%	10th proximo
Steel & Tubes, Inc.	6,360.00	5%	30 days
U. S. Electrical Export Corp.	6,200.00	5%	10th proximo
Walker Brothers	6,200.00	5%	10th proximo
S. Weinstein Supply Co.	5,823.95	2%	10 days
West Philadelphia Electric Supply Co.	6,200.00	5%	10 days
Westinghouse Electric Supply Co.	6,200.00	5%	10th proximo
Youngstown Sheet & Tube Company	6,200.00	5%	10th proximo
General Electric Supply Corp.	6,200.00	5%	10th proximo
Nathan Goodman Company, Inc.	6,200.00	5%	10th proximo

(Comm. Ex. 324.)

In the instance above, 10 of respondent conduit sellers submitted bids. Austin, Enameled Metals, Garland, Laclede Steel, Clayton Mark, National Electric, Steelduct, Walker Brothers, and Youngstown each bid \$6,200, and Steel and Tubes, Inc., bid \$6,360.

Bids on 2,000 feet of conduit for The Panama Canal opened December 21, 1938, were as follows:

Graybar Electric Co., Inc.	\$687.00	5%	10th proximo
The Greene-Wolf Co., Inc.	687.00	5%	10 days
Clayton Mark & Co.	687.00	5%	10th proximo
Monumental Electrical Supply Co.	688.00	5%	20 days
Steel & Tubes, Inc.	685.80	5%	10 days
Walker Bros.	687.00	5%	10th proximo
Williamsburg Electric Supl. Corp.	666.40	5%	10 days
General Electric Supply Corp.	686.60	5%	10th proximo
National Electric Products Corp.	687.00	5%	10th proximo
E. B. Latham & Co.	686.60	5%	30 days
Garland Mfg. Co.	687.00	5%	30 days
Gertler Elec. Supply Corp.	666.80	5%	10 days
Associated Hardware & Supplies Corp.	656.00	5%	20 days
Youngstown Sheet & Tube Co.	687.00	5%	10th proximo
Electrical Industrial Equipment & Supply Corp.	640.00	5%	10 days
American Electric Supply Co.	687.00	5%	10 days

(Resp. Ex. 12.)

It will be noted that 6 of respondent conduit sellers bid in the above instance. Clayton Mark, Walker Brothers, National Electric, Garland, and Youngstown each bid \$687, and Steel and Tubes, Inc., bid \$685.80.

(b) The effect of this pricing system in securing and maintaining identity of delivered-price quotations and prices in private sales was substantial. RSCA tabulated the percentage of all sales of conduit which were "on card"; that is, which accurately reflected the controlling base prices. In a memorandum circulated by Mr. Booth under date of February 10, 1938, it is stated:

The percentage of tonnage shipped in the month of December on Card 76 by the Industry was 81.46%.

This includes all the thirteen members in the Industry, and compares with 80.86% in the month of November 1937 (Comm. Ex. 496).

The report of the conduit committee of NEWA of its meeting of May 23, 1938, states in part:

You will probably be interested in knowing the manufacturers' report that in the month of March 1938, 87½% of the rigid iron conduit sold at card 76 (Comm. Ex. 39-D.)

Respondent conduit sellers placed evidence in the record indicating the percentage of adherence to card price by individual respondents for particular periods of time. The exact degree of adherence is immaterial, however, since it is clear from the entire record that the percentage of adherence was substantial and at times almost complete. The record also tends to show that departures from card prices were often largely confined to particular and limited areas and did not represent a condition general throughout the country.

(c) In addition to the statistical showing of the results of respondents' plans and activities, appraisals of results expressed in general terms appear in the record. Among these is a letter of December 23, 1938, from respondent Herbert S. Blake to I. A. Bennett summarizing the successes and failures of RSCA under his management and outlining a future course intended to correct the failures and "strengthen the basic value that the Association should be and can be made to be to the Industry * * *." He stated in part:

Major Quinn stated that you desired me to summarize my views as to the status of matters in the rigid steel conduit industry and outline what should be done to deal with the situation more effectively. This is rather a large order to fill by letter, especially as there are many "inside" things that should be said which are not desirable in a letter.

* * * * *

When the Association was reorganized, two years ago, consultation with the important factors in the industry resulted in the establishment of a method of merchandising which at that time was deemed necessary in order to correct the ills of the Industry. This plan was based on the view that it was absolutely necessary to control the "secondary" market and the probability of the success of the plan was founded upon the belief that the Distributors of conduit would support the plan whole-heartedly, * * *.

There is no question but what the plan, throughout the period, which followed a most chaotic market condition, did, for some months promote a far greater degree of stability in the industry than had existed for a long time previous, and resulted in earnings which could not otherwise have been achieved. * * *

Mr. Blake then stated that the program failed of continued success because distributors did not give it unqualified support and producers did not maintain their published prices, and said both of these conditions were due to a drop in the aggregate volume of sales because of general business conditions and the incursion of substitute products. He continued:

* * * The force which undermines even an approach to stability in the secondary market is weakness in the primary market and the only manner in which a firm secondary market can be developed is on the basis of certainty on the part of Distributors that the primary market is stable (Comm. Ex. 576-A and B).

In writing Mr. Blake after his resignation, Fretz-Moon stated in part:

It requires only casual observation of what has happened to us since we have lost your leadership to realize the benefits sacrificed by our foolish action in allowing you to withdraw. It is costing us today at least \$5.00 per ton for not following your advice and at this rate the total cost runs into very substantial figures (Comm. Ex. 621).

PARAGRAPH SIXTEEN: (a) In addition to the matters heretofore set out there are certain facts of a general nature which relate to and are explanatory of the basing-point delivered-price system used in quoting and selling conduit and of the results flowing from its use. Respondent conduit sellers produce all the con-

duit manufactured in this country. Conduit is produced by Cohoes at Cohoes, New York; by Enameled Metals at Etna, near Pittsburgh, Pennsylvania; by Fretz-Moon at East Butler, Pennsylvania; by Garland at West Pittsburgh, Pennsylvania; by General Electric at New Kensington, Pennsylvania; by Laclede at Alton, Illinois, near St. Louis, Missouri; by National Electric at Ambridge, near Pittsburgh, Pennsylvania; by Spang Chalfant at Etna, Pennsylvania; by Triangle at Moundsville, West Virginia; by Walker Brothers at Conshohocken, near Philadelphia, Pennsylvania; and by Youngstown at Struthers, Ohio, and Indiana Harbor, Indiana. The Indiana Harbor plant of Youngstown produces only the large sizes of conduit and not a full line. Clayton Mark Steelduct, Austin, and Clifton do not manufacture conduit, but sell and distribute conduit manufactured for them and under their own brands by one or more of the producers named above, and Republic, through its Steel and Tubes Division, distributes Fretz-Moon conduit. Seven of the twelve plants producing conduit are located within the switching limits of Pittsburgh, from which freight rates to other areas are the same although they may differ within the local area.

(b) The Chicago base price of conduit has been consistently maintained at a figure approximately \$4 per ton above the Pittsburgh base price. The area controlled by the Chicago base; that is, the area in which the sum of the Chicago base price plus delivery charge factors is less than the sum of the Pittsburgh base price plus delivery charge factors, is relatively quite small. It controls destination price quotations in Wisconsin, parts of Minnesota, Iowa, Missouri, Illinois, and Indiana, and certain small isolated areas in Wyoming, Colorado, Nevada, New Mexico, and Texas. Prices at all other destinations in the United States are controlled by the Pittsburgh base.

(c) Respondent conduit sellers have consistently published identical price quotations, and such quotations were upon a basing-point, delivered-price basis. With respect to the refusal of conduit sellers to quote true f. o. b. mill prices, occasional exceptions have occurred in the bids made to agencies of the Federal Government when land-grant freight rates were available to such agencies. Some of these exceptions, however, were more apparent than real, in that purported f. o. b. prices were in fact related to base prices or a method of freight equalization was used to eliminate differences resulting from the application of land-grant rates. Also, a conduit seller whose plant is located at a basing point can make sales to purchasers at locations where the price is controlled by such basing point upon an f. o. b. basis without necessarily infringing the basing-point price pattern.

(d) The price of conduit has shown a high degree of rigidity. For example, cards 72 and 82 were each in effect for at least 8 months, card 80 for about 10 months, card 69 for about 12 months, and card 70 for about 18 months. The failure of prices to respond to changing conditions of supply and demand, both locally and nationally, indicates the absence of effective competition. Some of the respondents have contended that the demand for conduit is not affected by price but is dependent upon the total volume of construction work, in which the cost of conduit is but a small factor. In some uses conduit must be installed regardless of price. In many uses, however, some of the products which compete with conduit may be installed in lieu of conduit when the price relationship and relative advantages and disadvantages warrant. A correlation of price changes with total sales of conduit, expressed in terms of percentage of industry capacity to produce, indicates not only that the volume of conduit sales responds to price changes, but also that the price of conduit has been rigid for long periods in the face of rapidly decreasing demand. At the time card 76 was issued in March 1937, increasing the price of conduit approximately 25 percent, total sales approximated 70 percent of the industry capacity to produce. Following this price increase, sales decreased rapidly and amounted to less than 25 percent of industry capacity in July 1938. In that month cards 77 and 78 were issued, the last of which reduced the price to the approximate level existing before card 76 was issued, and in November 1938 card 79 made a further reduction, which was canceled by card 80, issued in December 1938. Beginning with the first price reduction in July 1938, sales slowly and somewhat irregularly increased to about 50 percent of plant capacity in October 1939, when there was a price increase by the issuance of card 81, and this increase was followed by a sharp decline in sales to about 25 percent of plant capacity in February 1940. A price reduction

was made by card S2 in February 1940, and this was quickly followed by an increase in sales which reached about 60 percent of industry capacity before the end of 1940.

(e) Not all of the respondent conduit sellers distribute conduit on a national scale. The number and, in part, the identity of the conduit sellers whose products are available in any given section of the country vary as between different sections. Similarly, not all conduit sellers have sales representation at all locations where conduit is sold and the number and, in part, the identity of the conduit sellers whose products are available at any given location vary as between locations. The conduit sellers who actually distribute their products in sections and at locations where other conduit sellers do not seek to make sales are able to, and do, there maintain the basing-point, delivered-price formula as fully and as successfully as if all conduit sellers participated. In occasional instances in particular localities or to particular purchasers one or more conduit sellers, through intent or error, quote or sell conduit at prices which are not in accord with the basing-point delivered prices concurrently offered in the same localities or to the same purchasers by other conduit sellers. In such situations, when two or more but not all conduit sellers adhere to the formula prices, the effects produced by such adherence are similar in character but less in degree than those resulting when all conduit sellers adhere to the formula prices.

PARAGRAPH SEVENTEEN: (a) The use by respondent conduit sellers of the pricing formula heretofore described requires each such seller to discriminate among purchasers of conduit by charging some more than others for similar goods, not merely in the sense that the delivered cost to one purchaser is higher than to another by the amount of the difference in actual delivery costs, but through deliberately varying the seller's mill nets in order to quote prices identical with those of competitors at the same destinations according to the pattern established by the formula.

(b) A conduit seller whose mill is not located at a basing point charges fictitious delivery costs to purchasers located in his home town and at all other points where he has a freight advantage as compared with mills located at the controlling basing point, because under the formula generally followed his quotations at all such points amount to the sum of the base price plus the delivery charge factor from the basing point, although in fact the actual delivery cost is less than the delivery charge factor included in the delivered price. On such sales the seller's mill net is higher than the base price by the amount of "phantom freight" charged the purchaser. For example, Laclede Steel quotes prices in St. Louis which represent the sum of the Pittsburgh base price plus the delivery charge factor from Pittsburgh to St. Louis, although in fact the conduit is produced in and delivered from Alton, Illinois, a few miles from St. Louis. A similar example is Walker Brothers, which has its plant at Conshohocken, Pennsylvania, a few miles from Philadelphia. This company, nevertheless, quotes prices in Philadelphia equivalent to the sum of the Pittsburgh base price plus the delivery charge factor from Pittsburgh. In one large transaction, Walker Brothers quoted a price in Philadelphia which included approximately \$25,000 in phantom freight. In each such quotation the seller increases his mill net or real price by the exact amount necessary to produce a quotation equivalent to the sum of the controlling base price plus delivery charge factor from that base to the particular destination.

On the other hand, the conduit seller who is not located at a basing point shrinks his mill net below the controlling base price on sales at destinations where he is at a freight disadvantage as compared with the controlling base. In each such quotation the shrinkage of the mill net, or real price, is the exact amount necessary to produce a quotation equivalent to the sum of the controlling base price plus the delivery charge factor from that base to the particular destination.

(c) In the case of a seller whose plant is located at a basing point, his quotations at all destinations controlled by that base are the sum of the base price plus delivery charge factor from that base to the particular destination. However, when such a seller quotes at destinations controlled by another base, he shrinks his mill net or real price by the exact amount necessary to produce at any such destination a quotation equal to the sum of the controlling base price plus delivery charge factor from that base.

(d) In effect, this pricing pattern amounts to each seller inviting other sellers to share in the available business in his freight-advantage territory in return for the privilege of sharing in the available business in the freight-advantage territory of other sellers. It thus promotes the cross-shipping of conduit with the attendant costs, without tending to increase the total consumption of conduit. It requires the maintenance of a higher price level than would otherwise be necessary, in order that each seller may secure an additional margin on some sales to counterbalance the lower mill nets recovered on other sales, or, in other words, to permit sellers to distribute conduit, a heavy commodity upon which freight charges are substantial, upon a national scale. By denying to some purchasers the advantages of their location with respect to points at which conduit is produced, sellers are enabled to subsidize their own sales to other purchasers who are not so favorably located.

(e) Under the conditions which have existed in the industry each conduit seller has necessarily known that the other conduit sellers used the basing-point delivered-price system in the sale and distribution of conduit. Aside from the conditions which have existed, it is inevitable that the use of such system by any conduit seller in quoting prices on conduit would come to the knowledge, of the other conduit sellers through ordinary trade channels. As a practical matter, it would be impossible for one conduit seller to quote prices in accordance with the basing-point, delivered-price system and conceal that fact from the other conduit sellers.

PARAGRAPH EIGHTEEN: (a) In addition to knowledge of the use of the basing-point, delivered-price formula by others, each conduit seller knows that by its use each will be able to quote a price at any given destination identical with the prices quoted by others pursuant to such formula, and thus all users of the formula will be enabled to present to a prospective purchaser a condition of matched prices in which such purchaser is isolated and deprived of any choice on the basis of price. Respondent conduit sellers assert that in matching price quotations with other sellers at any given destination they are "meeting competition." In order to produce such matched prices sellers must, at numerous destinations, increase their mill nets or real prices and at numerous destinations concurrently reduce their mill nets. Such systematic price variations according to the pattern described do not represent competition in the ordinary meaning of that term. Each participant in the use of this pricing formula consciously intends that no attempt be made to exclude any seller from the natural freight-advantage territory of another and by the use of the formula in effect invites others to share the available business in his natural market in return for a reciprocal invitation.

(b) Respondents' basing-point, delivered-price formula is a pricing system recognized by economists as a controlled price or monopolistic price system and does not in its operation or results conform to the recognized economic principles which indicate the existence of free or effective competition. One of the characteristics of effective competition is that prices readily respond to changing conditions of supply and demand, whereas respondents' system has produced a high degree of price rigidity and at times prices have even moved contrary to what would be expected in a market amenable to the law of supply and demand. The use of the pricing formula produces a condition of mutual dumping inconsistent with the existence of effective competition. The systematic pattern of discriminations among purchasers of conduit would not exist concurrently with effective competition and the use of a formula which produces a condition of matched delivered-price quotations indicates the absence of effective competition.

(c) The economic principle that in a truly competitive market the unit price of a homogenous commodity tends to become approximately uniform does not serve to explain the results of the use of respondents' pricing formula. The tendency toward price uniformity in a free market results from the fact that in the purchase and sale of units of a homogenous commodity in such market, sellers are indifferent as to whose money they get for their commodity and buyers are indifferent as to whose commodity they get for their money. The systematic differences in mill nets accepted by respondent conduit sellers violate the principle of indifference. It is also true that the law of uniform price is limited in its application to prices which eventuate from actual sales and has no application to and cannot explain uniformity of price quotations.

PARAGRAPH NINETEEN: (a) Pursuant to Count I of the complaint herein, the Commission concludes from the evidence of record, and therefore finds, that the capacity, tendency, and effect of the combination and conspiracy maintained by the respondents named therein in the manner aforesaid, and the acts and practices performed thereunder and in connection therewith by said respondents as set out herein, has been, and is, to hinder, lessen, restrain, and suppress competition in the sale and distribution of conduit in, among, and between the several States of the United States; to deprive purchasers of conduit of the benefits of competition in price; to maintain artificial and monopolistic methods and prices in the sale and distribution of conduit; to prepare and maintain common rate factors and common delivery charge factors or "freight adlers" used and useful in determining and establishing price quotations and prices for conduit; to classify purchasers of conduit and determine the treatment to be accorded them; to establish and maintain uniform discounts, terms, and conditions of sale; to determine and control the use of warehouses in the distribution of conduit; to prepare, adopt, and use for the purpose of aiding in price maintenance and control, uniform contracts for distributors and for contractors buying for specific projects, and to enforce the terms of such contracts through investigations and reports thereon; to support and maintain their price structure through the conduct of investigations of sales and offers to sell, and the circulation of reports thereon; and otherwise to maintain and promote the purposes of their combination and conspiracy to hinder, lessen, and restrain competition in the sale and distribution of conduit.

(b) Pursuant to Count II of the complaint herein, the Commission concludes from the evidence of record, and therefore finds, that the capacity, tendency, and effect of the use by each respondent named therein of the basing-point delivered-price formula to determine price quotations and prices which will be made to conduit purchasers at any given destination concurrently with similar use of the same pricing formula by other of the said respondents has been, and is, to hinder, lessen, and restrain competition in price in the sale and distribution of conduit; to deprive purchasers of the benefits of competition in price; to unfairly discriminate among purchasers; and to create in each of said respondents a dangerous tendency toward a monopolistic control over price in the sale and distribution of conduit.

CONCLUSION

The aforesaid acts and practices of respondents constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

By the Commission.

[SEAL]

R. E. FREER, *Chairman*.

Dated this 6th day of June A. D., 1944.

ATTEST:

OTIS B. JOHNSON, *Secretary*.

UNITED STATES OF AMERICA BEFORE FEDERAL TRADE COMMISSION

At a regular session of the Federal Trade Commission, held at its office in the city of Washington, D. C., on the 6th day of June, A. D. 1944

Commissioners: Robert E. Freer, Chairman; Garland S. Ferguson; Charles H. March; Ewin L. Davis; William A. Ayres.

Docket No. 4452

IN THE MATTER OF RIGID STEEL CONDUIT ASSOCIATION, AN UNINCORPORATED ASSOCIATION; ITS OFFICERS: HERBERT S. BLAKE, PRESIDENT; LAWRENCE R. QUINN, TREASURER; PAUL WEISS, ASSISTANT TREASURER; ROBERT S. BOOTH, EXECUTIVE SECRETARY; ITS BOARD OF DIRECTORS: I. A. BENNETT, CHAIRMAN; J. M. BARTON, H. G. MORROW, LAWRENCE R. QUINN, H. S. WALKER, A. E. NEWMAN; AND ITS MEMBERS: CENTRAL TUBE COMPANY, CLAYTON MARK & COMPANY, COHOES ROLLING MILL COMPANY, ENAMELED METALS COMPANY, FRETZ-MOON TUBE COMPANY, INC., GARLAND MANUFACTURING COMPANY, GENERAL ELECTRIC COMPANY, LACLEDE STEEL COMPANY, LACLEDE TUBE COMPANY, NATIONAL ELECTRIC PRODUCTS CORPORATION, STEELDUCT COMPANY, TRIANGLE CONDUIT & CABLE COMPANY, INC., WALKER BROTHERS, YOUNGSTOWN SHEET AND TUBE COMPANY, CORPORATIONS, INDIVIDUALLY AND AS REPRESENTATIVE OF THE MEMBERS OF THE RIGID STEEL CONDUIT ASSOCIATION; GENERAL ELECTRIC SUPPLY CORPORATION, SPANG CHALFANT, INC., STEEL AND TUBES, INC., REPUBLIC STEEL CORPORATION, THE M. B. AUSTIN COMPANY, GEORGE L. HATHEWAY, REGINA G. HATHEWAY, KATHERINE R. HATHEWAY, AND JANE HATHEWAY, PARTNERS, TRADING AS CLIFTON CONDUIT COMPANY; CHARLES DONLEY; FRANK C. HODKINSON; ORGANIZATION SERVICE CORPORATION, A CORPORATION, AND ITS OFFICERS: HERBERT S. BLAKE, PRESIDENT, HERBERT S. BLAKE, JR., VICE PRESIDENT, N. MYLES BROWN, VICE PRESIDENT, THOMAS B. JORDAN, VICE PRESIDENT, PAUL WEISS, TREASURER, C. C. GREGORY, SECRETARY, INDIVIDUALLY AND AS REPRESENTATIVES OF THE ORGANIZATION SERVICE CORPORATION; THE NATIONAL ELECTRICAL WHOLESALERS ASSOCIATION, AN UNINCORPORATED ASSOCIATION, ITS OFFICERS: J. G. JOHANNESSEN, CHAIRMAN, D. L. FIFE, VICE CHAIRMAN, ALFRED BYERS, SECRETARY; THE MEMBERS OF ITS CONDUIT COMMITTEE: D. L. FIFE, W. S. BLUE, W. J. DRURY, A. H. KAHN, C. H. MCCULLOUGH, H. E. RASMUSSEN, H. O. SMITH, L. E. LATHAM, F. R. EISEMAN, W. R. KIEFER, H. B. TOMPKINS, A. L. HALLSTROM, A. S. RIECHMAN, D. M. SMITH; AND ITS MEMBERS: GENERAL ELECTRIC SUPPLY CORPORATION, E. B. LATHAM & COMPANY, FIFE ELECTRIC SUPPLY COMPANY, COLUMBIAN ELECTRICAL COMPANY, GRAYBAR ELECTRIC COMPANY, INC., W. T. MCCULLOUGH ELECTRIC COMPANY, PEERLESS ELECTRIC SUPPLY COMPANY, THE HARDWARE AND SUPPLY COMPANY, REVERE ELECTRIC COMPANY, KIEFER ELECTRICAL SUPPLY COMPANY, WESTINGHOUSE ELECTRIC SUPPLY COMPANY, F. D. LAWRENCE ELECTRIC COMPANY, THE C. S. MERSICH AND COMPANY, INDIVIDUALLY AND AS REPRESENTATIVE OF ALL THE MEMBERS OF THE NATIONAL ELECTRICAL WHOLESALERS ASSOCIATION

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answers of respondents, testimony, and other evidence in support of and in opposition to the allegations of said complaint taken before an examiner of the Commission theretofore duly designated by it, report of the trial examiner and exceptions thereto, briefs in support of the complaint and in opposition thereto, and oral arguments of counsel, and the Commission having made its findings as to the facts and its conclusion that said respondents have violated the provisions of the Federal Trade Commission Act:

IT IS ORDERED that respondent Rigid Steel Conduit Association, an unincorporated voluntary association, its officers, directors, representatives, agents, and employees, the corporate respondents Clayton Mark & Company, Cohoes Rolling Mill Company, Enameled Metals Company, Fretz-Moon Tube Company, Inc., General Electric Company, Laclede Steel Company, National Electric Products Corporation, Steelduct Company, Triangle Conduit & Cable Company, Inc., Walker Brothers, Youngstown Sheet and Tube Company, Republic Steel Corporation, M. B. Austin Company, their respective officers, representatives, agents, and employees, in or in connection with the offering for sale, sale, and distribution of rigid steel conduit in commerce, as "commerce" is defined in the Federal Trade

Commission Act, do forthwith cease and desist from entering into, continuing, cooperating in, or carrying out any planned common course of action, understanding, agreement, combination, or conspiracy between any two or more of said respondents, or between any one or more of said respondents and others not parties hereto, to do or perform any of the following things:

1. Quoting or selling rigid steel conduit at prices calculated or determined pursuant to or in accordance with the basing-point, delivered-price system; or quoting or selling rigid steel conduit at prices calculated or determined pursuant to or in accordance with any other plan, system, or formula which produces identical price quotations or prices for rigid steel conduit by respondents using such plan, system, or formula at points of quotation or sale, or to particular purchasers, or which prevents purchasers from finding any advantage in price in dealing with one or more of the respondents as against any of the other respondents.

2. Establishing, fixing, or maintaining prices, terms, or conditions of sale for rigid steel conduit, or adhering to any prices, terms, or conditions of sale so fixed or maintained.

3. Collecting, compiling, circulating, or exchanging information concerning common-carrier transportation charges used or to be used as a factor in computing the price of rigid steel conduit; or using, directly or indirectly, any such information so collected, compiled, or received as a factor in computing the price of rigid steel conduit.

4. Collecting, compiling, circulating, or exchanging "freight adders," delivery charge booklets, or other information concerning delivery charges on rigid steel conduit used or to be used as a factor in computing the price of such conduit; or using, directly or indirectly, any such information so collected, compiled, or received as a factor in computing the price of rigid steel conduit.

5. Circulating or exchanging information concerning the classification granted or to be granted to any specific purchaser of rigid steel conduit; or determining upon any basis for the selection or classification of customers, or using any basis so determined for selecting or classifying customers.

6. Determining upon the location, establishment, maintenance, or discontinuance of warehouses or other places for the stocking of supplies of rigid steel conduit.

7. Formulating or adopting consigned stock, specific building, or any other forms of contracts or agreements concerning the sale or distribution of rigid steel conduit, or using any contracts or agreements so formulated or adopted, for the purpose or with the effect of aiding or assisting in arriving at or maintaining uniform prices, terms, or conditions in the sale or distribution of such conduit.

8. Directly or indirectly investigating or checking the prices, quantities, terms, or conditions of any sale or offer to sell rigid steel conduit to any buyer or prospective buyer for the purpose or with the effect of aiding or assisting in maintaining uniform prices, terms, or conditions in the sale of such conduit.

9. Doing or causing any of the things forbidden in the preceding paragraphs of this order to be done through respondents Charles Donley, Herbert S. Blake, Organization Service Corporation, or any other individual, corporation, or organization.

IT IS FURTHER ORDERED that respondent Charles Donley, an individual, his representatives, agents, and employees, do forthwith cease and desist from knowingly, advising, assisting, or cooperating with the aforesaid respondents, or any of them, in doing any of the things forbidden by paragraph numbered 3 above.

IT IS FURTHER ORDERED that respondent Herbert S. Blake, an individual, his representatives, agents, and employees, and respondent Organization Service Corporation, a corporation, its officers, representatives, agents, and employees, do forthwith cease and desist from advising, aiding, assisting, or directing the aforesaid respondents in any manner in doing any of the things forbidden by paragraphs numbered 1 to 8, inclusive, of this order.

IT IS FURTHER ORDERED that respondent The National Electrical Wholesalers Association, an unincorporated association, its officers and members, the officers and members of its conduit committee, and respondents General Electric Supply Corporation, a corporation, E. B. Latham & Company, a corporation, Graybar

Electric Company, Inc., a corporation, Revere Electric Supply Company, a corporation, Kiefer Electric Supply Company, a corporation, Westinghouse Electric Supply Company, a corporation, Fife Electric Supply Company, Columbian Electrical Company, W. T. McCullough Electric Company, Peerless Electric Supply Company, The Hardware and Supply Company, F. D. Lawrence Electric Company, and The C. S. Mersick and Company, individually and as such members, their respective officers, representatives, agents, and employees, do forthwith cease and desist from aiding, assisting, or cooperating in any manner with the respondents subject to the provisions of paragraphs numbered 1 to 8, inclusive, of this order, or any of them, in doing any of the things forbidden in said paragraphs.

IT IS FURTHER ORDERED that each of the corporate respondents Clayton Mark & Company, Cohoes Rolling Mill Company, Enameled Metals Company, Fretz-Moon Tube Company, Inc., General Electric Company, Laclede Steel Company, National Electric Products Corporation, Steelduct Company, Triangle Conduit & Cable Company, Inc., Walker Brothers, Youngstown Sheet and Tube Company, Spang Chalfant, Inc., Republic Steel Company, and M. B. Austin Company, their respective officers, representatives, agents, and employees, and respondents George L. Hatheway, Regina G. Hatheway, Katherine R. Hatheway, and Jane Hatheway, copartners trading as Clifton Conduit Company, their representatives, agents, and employees, in or in connection with the offering for sale, sale, and distribution of rigid steel conduit in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from doing any of the following things for the purpose or with the effect of systematically matching delivered-price quotations with other of said respondents or producing the equivalent of such matched delivered prices through systematic discriminations in the mill nets received on sales to different purchasers:

(a) Quoting or selling rigid steel conduit at prices calculated or determined pursuant to, or in accordance with, the basing-point, delivered-price system.

(b) Quoting or selling rigid steel conduit at delivered prices calculated as, or systematically equivalent to, the sum of the price in effect at, plus a transportation charge factor from, any point other than the actual shipping point.

(c) Quoting or selling rigid steel conduit at delivered prices which systematically reflect the inclusion of a transportation factor greater or less than the actual cost of transportation from point of shipment to destination.

(d) Discriminating among purchasers by quoting or selling rigid steel conduit at prices which systematically differ in terms of mill nets according to the location of purchasers, and which mill nets, plus common carrier transportation charges to the respective locations of such purchasers, produce delivered costs identical with those to such purchasers from differently located respondents.

IT IS FURTHER ORDERED that, for reasons appearing in the findings as to the facts, the complaint herein be, and the same hereby is, dismissed as to Central Tube Company, Garland Manufacturing Company, Laclede Tube Company (Missouri), Steel and Tubes, Inc., and F. C. Hodkinson; that Count I of the complaint be, and the same hereby is, dismissed as to respondents George L. Hatheway, Regina G. Hatheway, Katherine R. Hatheway, and Jane Hatheway, copartners trading as Clifton Conduit Company, and respondent Spang Chalfant, Inc.; and that Count II of the complaint be, and the same hereby is, dismissed as to respondent General Electric Supply Corporation.

IT IS FURTHER ORDERED that the respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

By the Commission.

[SEAL]

OTIS B. JOHNSON, *Secretary*.

Mr. DAVIS. There was criticism submitted that the Commission does not render written opinions.

I submit that the findings of facts, which the Commission is required to submit, it must always submit a finding of facts which will support any order that it gives, and if it does not, it would be reversed for that alone, which is unlike a court. A court can render a decision without rendering any opinion if it wants to, but neither the Commission nor any other administrative body can; they must set out the

facts, call it a finding of facts, but I submit that the findings of facts in these cases are fuller and more illuminating than any opinion you ever see rendered by a court with few exceptions.

If they want to find out what case decisions are involved, if they will just go back a step and read the briefs filed on both sides by the lawyers who cite the decisions upon which they rely——

Mr. REECE. When did the Commission stop writing opinions?

Mr. DAVIS. Well, the Commission except from time to time has not written any opinions since I have been on the Commission, but they do write the findings of facts, which is as illuminating as can be, and most of these lawyers do not need it, so far as that is concerned, but if they do want to study the law farther, if they will look in the briefs, they can find all of the decisions that either side has relied upon in that particular case.

Mr. REECE. You are familiar with the recommendation of the Attorney General's Committee which recommended that written opinions be rendered.

On what did they base that conclusion, or do you have knowledge of that?

Mr. DAVIS. It has been so long since I read that I would not undertake to state. That was years and years ago.

Mr. REECE. As I see it, the difference between the statement of fact to which you refer and the written opinion is this, a written opinion gives the basis for the decision and analysis of the reasoning that led to the conclusion, whereas a statement of fact, an example of which you had here, may embrace a hundred or hundreds of pages becoming all-inclusive with reference to the facts before the Commission which makes it difficult for an attorney, by reading it, to ascertain with any very great definiteness the deciding facts which enabled the Commission to reach a decision.

In reaching a decision, I hardly assume that the Commission gave the same weight to all of the facts enumerated in a statement consisting of hundreds of pages.

It is because of that fact that the attorneys would prefer to have written opinions.

I assume that there was some logical, or at least presumably logical, basis for the Attorney General's Committee to recommend that written opinions be rendered.

Mr. DAVIS. Do you know anybody that has adopted that recommendation of the Attorney General?

Mr. REECE. I do not have knowledge of that.

Mr. DAVIS. Neither do we.

Mr. KELLEY. I would like to clear up this a little. I would like to get the facts clearer to you. It depends upon the type and the character of the case.

A month ago, 2 months ago, the Commission issued a finding in a very important case involving price discrimination in the Detroit area under the Robinson-Patman Act against the Standard Oil Co. of Indiana. We are negotiating with the company now and I think there is an argument next week on the question of a modified order.

The findings in that case set out very clearly what you would call an opinion and the theory of the case, very, very extensively.

I refer you to the case against the Staley and the Corn Products companies involving a basing point. The findings in those cases

in detail and elaborately set out more than what you would call a court opinion.

I refer you to the every extensive findings in the Cement case, much, much more exact and longer than the court will take when it writes its opinion.

The theories as well as all of the detailed facts are not only analyzed, but the whole theory of the law.

About 3 months ago, the Commission had a peculiar case under the Robinson-Patman Act against a cosmetic house in New York involving hidden demonstrators. It was a very elaborate finding.

One of the business houses, a department store in the southwest, was injured by that discrimination in the Arden case, sued the Arden company for threefold damages under the Sherman law in a private suit. They won the case. I think it is now in the Supreme Court of the United States. And the District Judge, in that case, commented very extensively on the Commission's finding and quoted at length in his opinion from the Commission's decision, and in fact, the Judge, I think, was very much enlightened in that very technical matter on account of the Commission's opinion in its findings.

I could refer you to the Commission's cases against the Rigid Steel Conduit Co., against the people involved in selling cable, the General Electric Co. These cases have all gone to the courts. The milk- and ice-cream-can industry, the blueprint-paper industry, and a great multitude of them, where the findings are very elaborate, much more elaborate in the sense of a legal opinion than you will find in a judicial decision, including the two recent cases involving the momentous question of basing point in discriminations flowing from the basing point.

These cases represent whole industries and the most very important public questions before the courts in generations, very technical matters, matters that have never been passed upon by the judiciary, like the questions that were involved in the Corn Products case and the Staley case, the case against the U. S. Steel Corp. involving identical prices through a formula, a basing point, and the case that we had in Chicago that is coming up on a tremendous record involving identical things through the use of the basing-point formula.

Those are the cases in which you need opinions, and those are the kind of cases in which the Commission is giving opinions.

When John Jones represents a product as containing silk when it is made out of cotton, and when a patent-medicine concern advertises falsely, and you set forth the facts that you find by the evidence and put it into the finding what is false, you do not need an opinion.

Mr. REECE. What harm would be rendered by writing an opinion in any of those cases?

Mr. KELLEY. About the only opinion you would have would be to repeat the findings that John Jones represented so and so, state that truth is that that statement was false, and add that a statement that was false and circulated in interstate commerce that has the capacity of injuring the people is unlawful, period. You do not need those kinds of opinions. The findings speak for themselves.

Mr. DAVIS. I will answer you.

The Federal Trade Commission, like nearly all other agencies, is not able to handle all of the cases that it could handle if it had more funds and a larger staff.

I think we do a good job with what we have. We have jurisdiction over five different acts and we have less funds than we did just a few years ago. I do not remember just how it is now, but if you recall, a few years ago, it was stated at a committee here that this Commission, for all of its activities, had \$100,000 less appropriations than the Food and Drug Administration had on food and drug and devices alone.

The harder you make it, the more you require, the more difficult it is going to be to protect the public interest and stop these things that a congressional act says we shall do. We are directed to stop these things. We are simply doing the best we can to do it, but if Congress is going to depart from its position, when it enacted the Federal Trade Commission Act and when it enacted the Wheeler-Lea Act, to consider the public interest, and not a small fringe of false advertisers and price fixers, and so on, why, it is going to be still harder.

Mr. Chairman, did I understand that I was permitted to introduce in the record the House and Senate reports on the Wheeler-Lea Act?

Mr. SADOWSKI. I think they ought to go in.

Mr. DAVIS. Because this bill is, with the exception of the first provision, an attack on the Wheeler-Lea Act, which it was stated by Chairman Lea and by Congressman Reece and various others, was passed for the purpose of strengthening the hand of the Federal Trade Commission in order that it could better protect the public interest and the public health. That was the position that was considered then, not to try to get it so easy that anybody could continue any sort of false advertising that they wanted without regard to how many people it killed or injured.

(The Senate and House reports referred to are as follows:)

[S. Rept. No. 1705, 74th Cong., 2d sess.]

AMENDMENTS TO FEDERAL TRADE COMMISSION ACT

The Committee on Interstate Commerce, to whom was referred the bill (S. 3744) to amend sections 4, 5, 6, and 9 of the Federal Trade Commission Act, having considered the same, report the bill back to the Senate, with an amendment, with the recommendation that the bill, as amended, do pass.

Considerable press comment and numerous letters from chambers of commerce and the like have been provoked by a misunderstanding of the nature of the proposed legislation. It has been charged that this is an attempt to make the Federal Trade Commission an inquisitorial body and invest it with unlimited police powers. This is very inaccurate and misleading. It was pointed out in the public hearings which your committee held on the bill that many of the objections which were being raised were to portions of the Federal Trade Act which have been a part of the law for over 20 years.

A brief explanation of the nature of the functions of the Federal Trade Commission will be helpful to the consideration of the amendments under this bill.

Under section 5, unfair methods of competition are declared unlawful, and upon complaint the Commission is empowered to investigate and to call the parties before it for a hearing on the complaint. The Commission then either dismisses the complaint, or issues an order against the respondent to cease and desist from the specific trade practice which the Commission finds to be an unfair method of competition under the order.

The procedure is unlike that under the Pure Food and Drug Act or the Postal Statutes, in that it is merely preventive and cooperative rather than penal. An appeal from the order of the Commission can be taken to any circuit court of appeals, and the court, to quote from the Act, "shall have * * * jurisdiction to affirm, set aside, or modify the order of the Commission." If the respondent

violates the cease and desist order of the Commission, the latter must go to the court for enforcement of the order, and the same right of review, affirmation, modification, or setting aside is given to the court at this stage of the proceeding.

Under section 5 the Commission is a quasi-judicial body in determining what constitutes an unfair method of competition, or, under the proposed legislation, an unfair or deceptive act or practice. This power was given to the Commission under the original act, rather than to attempt to define in the statute all the different unfair practices. On June 13, 1914, the Senate Committee on Interstate Commerce in reporting the bill used the following language:

"The committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid their continuance or whether it would by a general declaration condemning unfair practices, leave it to the Commission to determine what practices were unfair. It concluded that the latter course would be the better, for the reason, as stated by one of the representatives of the Illinois Manufacturers' Association, that there were too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others."

It must be noticed in the above quotation that the committee was concerned with the elimination of unfair practices, and the phrase "unfair methods of competition" was adopted as the expression of policy behind the legislation. However, in the course of the past 2 decades during which the courts have considered and defined the jurisdiction of the Commission, the judicial construction placed on the words "methods of competition" has forced the Commission to prove competition and injury to competitors before it could order that the unfair methods be stopped.

The committee is of the opinion that the Commission should have jurisdiction to restrain unfair or deceptive acts and practices which deceive and defraud the public generally without being put to the necessity of proving that the competitors of the offender have suffered monetary damage.

It was never the intention of Congress that the Commission should be a forum where private disputes or controversies between competitors should be settled, and the Commission is required to find that a proceeding is in the public interest in order to retain jurisdiction of it. In the case of *Federal Trade Commission v. Klesner*, involving the passing off of one trader's goods for those of another, the Supreme Court held that:

"A complaint may be filed only 'if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public.' This requirement is not satisfied by proof that there has been misapprehension and confusion on the part of purchasers, or even that they have been deceived the evidence commonly adduced by the plaintiff in 'passing off' cases in order to establish the alleged private wrong. It is true that in suits by private traders to enjoin unfair competition by 'passing off,' proof that the public is deceived is an essential element of the cause of action. This proof is necessary only because otherwise the plaintiff has not suffered an injury. There, protection of the public is an incident of the enforcement of a private right. But to justify the Commission in filing a complaint under 5, the purpose must be protection of the public. The protection thereby afforded to private persons is the incident."

The inevitably sound conclusion is that where it is not a question of a purely private controversy, and where the acts and practices are unfair or deceptive to the public generally, they should be stopped regardless of their effect upon competitors. This is the sole purpose and effect of the chief amendment to section 5.

The remaining amendments to this section are procedural in character and are designed to expedite proceedings for review or enforcement of the Commission's orders in the courts, or to lessen the expense of such proceedings.

COMMITTEE AMENDMENT AND SECTIONAL ANALYSIS

The committee amended section 3 of the bill by striking out subsection (i), which reads as follows:

"(i) The Congress hereby confers upon the Commission so much of the auxiliary power of Congress to obtain information in aid of legislation as may be necessary to enable the Commission to carry out the provisions of section 6."

First, the bill amends section 4 of the present act which has to do with definitions. Section 4 is amended by including within the definition of "corporation" a trust or so-called Massachusetts trust and by including within the term "documentary evidence" in addition to all documents, papers and correspondence, "books of account and financial and corporate records." The definition of "anti-

trust acts" in this section is further amended by specifically including the Clayton Act, which was approved October 15, 1914, subsequent to the passage of the Federal Trade Commission Act.

Section 5 of the present act declares unlawful unfair methods of competition in commerce, and the pending bill amends that section by also declaring unlawful, unfair, or deceptive acts and practices in commerce. Under the present act it has been intimated in court decisions that the Commission may lose jurisdiction of a case of deceptive and similar unfair practices if it should develop in the proceeding that all competitors in the industry practiced the same methods, and the Commission may be ousted of its jurisdiction, no matter how badly the public may be in need of protection from said deceptive and unfair acts. Under the proposed amendment the Commission would have jurisdiction to stop the exploitation or deception of the public, even though the competitors of the respondent are themselves entitled to no protection because of their engaging in similar practices. It further appears that much time and money must now be expended in order to establish competition and to show injury to competitors, as the courts have held that competition and injury to the same must be established in order for the Commission to retain jurisdiction. Under the proposed amendment, if the Commission should have reason to believe that unfair and deceptive acts and practices are being engaged in, and that it is in the public interest that they be stopped, it could issue its restraining order without being put to the necessity of establishing competition and injury to such competition. The necessity of this amendment is made apparent by the decision of the Supreme Court in a case involving deceptive advertising, in which the Commission had issued its order to cease and desist. In that case the court said:

"If the necessity of protecting the public against dangerously misleading advertisements of a remedy sold in interstate commerce were all that is necessary to give the Commission jurisdiction, the order could not successfully be assailed."

In spite of the finding of the Supreme Court that the advertising in question was misleading and dangerous to the public, it held that the Commission had no jurisdiction to order the respondent to cease and desist because it had not been shown that the respondent had competitors who were injured.

Some objection was voiced in the committee to the use of the word "acts" and the suggestion was made that the word "methods" should be substituted for the word "acts", or that the word "acts" be eliminated entirely. After consideration the committee is of the opinion that, since the powers of the Commission in this respect are injunctive rather than punitive, the Commission should have the power to restrain an unfair act before it had become a method or practice, if, in its discretion, such restraint be in the public interest. A single act may have multiple or continuing effects, may be far reaching.

The other amendments to section 5 of the present law are procedural in character, and are designed to expedite and to lessen the expense of proceedings to review or to enforce the Commission's orders in the courts.

One amendment to section 6 is designed to make clear that the Commission is to exercise its general investigatory powers under paragraph (a) either upon the direction of either house of Congress or the President or upon its own initiative. Persons and partnerships, engaged in interstate commerce, already subject to section 5, are made subject also to section 6 which now extends only to corporations. In no other respect do the amendments of this section extend the investigatory powers of the Commission.

The first amendment to section 9 makes clear that the power to inspect and copy documents in investigations and the power to subpoena witnesses and documents may be exercised when the Commission is proceeding either under section 5 or 6. It is customary to confer this power upon investigatory and fact-finding agencies. It has been conferred upon the Interstate Commerce Commission and upon the Securities and Exchange Commission.

Further, there can be no danger of abuse of the power by the Commission since the command of the subpoena can be enforced only by an order of a district court of the United States.

Another amendment requires that for a natural person to secure immunity from prosecution concerning any matter about which he shall testify he must claim the privilege before giving the testimony or producing the evidence. The purpose of this amendment is that the Commission may be advised that he claims this immunity in time to determine whether the public interest will best be served by foregoing the testimony or the production of evidence or granting the immunity. A similar provision is contained in the Securities Exchange Act.

Hearings were held for four days on the bill (S. 3744) and all parties desiring to appear were heard or filed statements. Printed hearings will be available.

It is the opinion of the committee that the bill, amended by striking out subsection (i) of section 3, is in the public interest and should be enacted.

The following report on the bill was received from the Federal Trade Commission:

FEDERAL TRADE COMMISSION,
Washington, February 11, 1936.

HON. BURTON K. WHEELER,

*Chairman, Committee on Interstate Commerce,
United States Senate, Washington, D. C.*

DEAR MR. CHAIRMAN: With further reference to yours of the 4th instant, submitting copy of bill S. 3744, and advising that your committee would appreciate having the views of the Federal Trade Commission on this proposed legislation, I beg to report as follows:

The amendments to the Federal Trade Commission Act embodied in this bill all tend to clear up doubtful points and to expedite proceedings and reduce expense. In the opinion of the Commission the proposed amendments are in the public interest, and the bill has the approval of the Commission.

Section 1: This section amends section 4 of the act. The "trust" or so-called Massachusetts trust is included (p. 2, lines 9, 13) in the definition of a corporation. There are some extensive businesses operated under the so-called common-law or Massachusetts trust which resembles a corporation in its organization and operation in many particulars. There may be some doubt whether the trust would be considered a company or association.

To the definition of antitrust acts, the Clayton Act is added (p. 3, line 8). It is one of the antitrust acts but had not been passed at the time the Federal Trade Commission Act was written.

The definition of "documentary evidence" is amended by adding the words, "books of account, financial and corporate records" (p. 2, line 19). This serves to remove any doubt that such books and records are included in the documentary evidence which is subject to the Commission's inspection and subpoena under section 9 of the present act. It has been the experience of the Commission that this definition should be clarified by these added words.

Section 2: This section amends section 5 of the present act, first, by adding the words "deceptive acts and practices" (p. 3, lines 14, 20, 24-25), so that the first paragraph would read:

"That unfair methods of competition and deceptive acts and practices in commerce are hereby declared unlawful."

Without these amendatory words, there is a question whether the Commission has jurisdiction of a case of deceptive or other unfair practices where it develops that the offender has no competitor but has a monopoly in his field, or that all competitors in the industry are equally guilty. However much the public interest may be in need of protection in such a case, the Commission may be powerless to give it. In one case involving deceptive advertising in which the Commission had issued its order to cease and desist, the Supreme Court said:

"If the necessity of protecting the public against dangerously misleading advertisements of a remedy sold in interstate commerce were all that is necessary to give the Commission jurisdiction, the order could not successfully be assailed."

In spite of the finding of the Court that the advertising in question was misleading and dangerous to the public, it held that the Commission had no jurisdiction to order the respondent to cease and desist because it had not been shown that the respondent had competitors who were injured by the deceptive advertisements.

The fourth paragraph of section 5, as amended by the bill, provides (p. 5, line 7) that the Commission may proceed in the circuit court of appeals for the enforcement of its order whenever it has reason to believe that its order is not being obeyed or is about to be disobeyed. This part of the present act provides that "If such person, partnership, or corporation fails or neglects to obey such order," the Commission may proceed in the circuit court of appeals to enforce its order. In *Federal Trade Commission v. Standard Education Society* (14 Fed. (2d) 947), the seventh circuit court of appeals held that the Commission's application for enforcement first presents the question whether the respondent has failed to obey the order, and this fact must be presented and passed upon before the validity of the order is to be considered. However, in the second circuit, in *Federal Trade Commission v. Paul Bahur*, (23 Fed. (2d) 615), it was held that the question of the violation of the Commission's order is not involved until a valid order has been

recognized by the court. A majority of the circuit courts of appeals have followed the interpretation of the second circuit, and the proposed amendment will settle this conflict in harmony with the majority opinion and settle it in such a way that the Commission will not be put to the expense, which in some cases may be great and in all cases will be substantial, of proving the violation of an order that the court may later, in the same proceeding, declare invalid.

It is evident that this amendment will not prejudice any right of the person being proceeded against. The purpose and result of the Commission's application to the circuit court of appeals to affirm or enforce its order is to establish the validity of the order and make the Commission's order the order of the court. Only when the Commission thereafter asks the court to punish the person being proceeded against for violation of the order should the Commission be required to prove that it has been violated. Under the seventh circuit's interpretation the Commission must make that proof both when it asks the court to affirm the order and again when it asks for the punishment of the respondent for a violation of the court's order.

The fourth and fifth paragraphs are further amended (p. 6, line 1; p. 7, line 15), so that either upon an application by the Commission for the enforcement of its order, or upon an application by the respondent to set the Commission's order aside, the circuit court of appeals may enter its order enforcing the Commission's order to the extent that it is affirmed. This amendment makes it clear that while the court has the matter before it, either upon the application of the Commission or upon the application of the person being proceeded against, it may enter its decree commanding obedience to the Commission's order, or, if it modifies the Commission's order, commanding obedience to the modified order. The amendment is in the interest of expeditious enforcement of the law.

The fourth and fifth paragraphs are also amended (p. 6, line 2; p. 7, line 15) to give the circuit court of appeals jurisdiction to issue writs necessary in its judgment to prevent injury to the public or to competitors, *pendente lite*. Experience has shown that cases may and do arise where the business practice in question is of such a nature that its continuance during the pendency of the proceedings in the circuit court of appeals will work irreparable injury to the public or competitors. The proceeding in the circuit court of appeals is an original proceeding, but is also in the nature of a review of the Commission's proceedings. Federal courts of original jurisdiction ordinarily have authority to issue temporary injunctions *pendente lite*, and appellate courts have that power when properly auxiliary to their appellate jurisdiction; but since this is a special proceeding, it appears wise to give the circuit court of appeals express power to restrain the continuance of the unfair method pending final decision, whenever, in its opinion, the public interest requires it.

Precedent for such a provision is found in the Packers and Stockyards Act, 1921. It is provided (sec. 194 (c), title 7, U. S. C. A.) that after appeal has been taken from the Secretary's order to cease and desist to the circuit court of appeals, the court "may issue a temporary injunction restraining, to the extent it deems proper, the packer * * * from violating any of the provisions of the order pending the final determination of the appeal." And in the Securities Exchange Act of 1934 (sec. 78 y (b), title 15, U. S. C. A.) it is provided that the commencement of proceedings in the circuit court of appeals to review an order of the Securities and Exchange Commission shall not operate as a stay of the order "unless specifically ordered by the court."

At the end of the fifth paragraph is added a sentence as follows (p. 7, line 19): "In no case shall it be necessary to establish a violation of the order of the Commission as a condition precedent to the affirmation, modification, or setting aside of the same, or entering an order enforcing it."

This relates back to the first proposed amendment to the fourth paragraph discussed on page 3 hereof, providing that the Commission may make application to the circuit court of appeals to affirm its order whenever it has *reason to believe* that its order is not being obeyed or is about to be disobeyed.

Paragraph five of section 5 is amended (p. 7, lines 6-7) to limit the time to 60 days within which the person being proceeded against may make application to the circuit court of appeals to set aside an order of the Commission. A further amendment provides (p. 7, lines 2, 3) that at the end of this 60 days, if such application shall not have been made, the Commission's order shall become final and conclusive, and fixes a penalty for failure to obey it, recoverable in a civil action by the United States. Under the present act there is no time fixed within the application must be made and the respondent may, without incurring any liability, continue to use the unfair method until the Commission discovers

the fact and secures an enforcement order in the circuit court of appeals. This proposed amendment would prevent a respondent playing fast and loose with the Commission's order, neither obeying it nor asking the court to set it aside.

Such provisions as are embodied in this amendment are not novel. Under the Packers and Stockyards Act of 1921 the procedure before the Secretary of Agriculture, in case of the use by a packer of certain practices declared by the act to be unlawful, is almost identical with the procedure before the Commission under section 5. The Packers Act provides (see sec. 194 (a) title 7, U. S. C. A.) that an order of the Secretary to cease and desist shall become final after 30 days unless appeal shall have been taken to a circuit court of appeals. And section 195 (1) provides that the violation of his order to cease and desist after the expiration of the 30 days without an appeal shall subject the violator to fine and imprisonment. A similar limit of the time for appeal appears in the Securities Exchange Act (sec. 78 y (a), title 15, U. S. C. A.).

The last paragraph of the present section 5 prescribes the method of serving "complaints, orders, and other processes" of the Commission; first, by delivering a copy to the person to be served; second, by leaving the copy at his or its principal place of business; or third, by mailing, registered, a copy to his or its principal place of business. In practically every case service by mail is most convenient, expeditious, and economical. But in many cases, particularly, where the process to be served is a subpoena, the witness or person to be served has no "place of business." This paragraph is amended to provide (p. 9, lines 2, 6) that process may be served also by registered mail to the residence of the person to be served.

At various places in the present section 5, the word "testimony" instead of "evidence" is used. "Testimony" strictly means oral evidence only, and the broader term "evidence" is evidently intended and has been substituted (p. 5, lines 17, 24; p. 6, lines 6, 21; p. 7, line 18).

Section 3: This section amends section 6 of the act as follows:

First is amended subdivision (a) of section 6 expressly giving the Commission power to proceed either upon its own initiative or upon the direction of the President or either House of Congress (p. 9, line 16). Section 6 contains the Commission's fundamental powers of investigation, and it is desirable to remove any doubt as to whether the exercise of its powers must await the transpiring of some condition precedent, such as the institution of legal proceedings or formal direction to investigate a situation, or whether its powers are available for use in the performance of all its statutory duties.

This subdivision (a) is broadened to include persons and partnerships (p. 9, lines 20, 23) in addition to corporations, within the field of the Commission's power to investigate business practices and conditions in interstate and foreign commerce. It is manifest that unfair, detrimental, or illegal practices affecting or interfering with such commerce may be carried on as well by persons and partnerships as by corporations. This addition of persons and partnerships is carried into other subdivisions of this section (p. 10, lines 1-2, 11-12; p. 11, lines 1-2, 11; p. 12, lines 4-5), and into section 9 (p. 12, lines 17, 22-23) for the same reason.

Subsection (i), a new subsection (p. 12, lines 7-10) confers upon the Commission so much of the auxiliary powers of Congress to obtain information in aid of legislation as may be necessary to enable the Commission to carry out its duties under the section. In *Humphrey's Executor v. U. S.* (205 U. S. 602), the Supreme Court said (p. 628):

"The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute, * * * and to perform other specified duties as a legislative or as a judicial aid. * * * In making investigations and reports thereon for the information of Congress under section 6, in aid of the legislative power, it acts as a legislative agency."

Since Congress has imposed upon the Commission the duty to make these investigations as its legislative aide, it undoubtedly intended to give it the necessary power to proceed.

Section 4: This section amends section 9 of the present act, which relates to evidence, testimony, and witnesses. There has been doubt and confusion on the question whether, and to what extent, the power of subpoena conferred by section 9 applies to investigations under section 6. In the *Millers' National Federation* case (decided Sept. 22, 1926) the Supreme Court of the District of Columbia held that the power of the Commission to compel the attendance and testimony of witnesses and the production of documentary evidence is

limited to formal proceedings under section 5 and has no application to investigations under section 6. The Court of Appeals of the District upheld the Commission's power of subpoena in investigations under section 6, where it was proceeding pursuant to a resolution of the Senate, but it seems to base its decision upon the ground that the resolution of the Senate was tantamount to a delegation of the power vested in the Senate itself. Under this ruling, the Commission would have no such power when proceeding on its own initiative, under section 6.

In the *Electric Bond & Share case* (34 Fed. (2d) 323) the United States District Court for the Southern District of New York sustained the power of the Commission to issue subpoena for the attendance of witnesses for oral testimony, but circumscribed and limited its power to subpoena documentary evidence, when pursuing an investigation under section 6.

The proposed amendment is clarifying and removes the uncertainty arising out of the foregoing decisions, by expressly conferring upon the Commission the power, as was originally intended, to subpoena witnesses for oral testimony and to examine and subpoena documentary evidence, when it is proceeding either under section 5 or section 6 (p. 13, lines 22-25). It is customary to confer this power upon investigatory and fact-finding agencies. It is conferred upon investigating committees of Congress, and section 19 (b) of the Securities Act of 1933 (carried into the Securities and Exchange Act of 1934) provides:

"For the purpose of all investigations which, in the opinion of the Commission, are necessary and proper for the enforcement of this title, any member of the Commission, or any officer or officers designated by it, are empowered to * * * subpoena witnesses * * * and require the production of any books, papers, or other documents, which the Commission deems relevant or material to the inquiry."

The same power is given the Interstate Commerce Commission, "and for the purposes of this chapter, the Commission shall have power to require, by subpoena, the attendance and testimony of witnesses and the production of any books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation (sec. 12, title 49, U. S. C. A.)."

Further, there can be no danger of abuse of the power by the Commission since the command of the subpoena can be enforced only by an order of a district court of the United States (see p. 13, lines 12-13, 24-25).

The third paragraph of section 9 is amended (p. 13, lines 15-16) so that in a case of contumacy or refusal to obey a subpoena a proceeding to enforce obedience may be brought in any United States district court in which the person resides, or carries on business, or is found. Under the present act, the jurisdiction is confined to the district court of the district in which the Commission's inquiry is being carried on. This amendment is to the convenience both of the Commission and members of the public who may be subpoenaed. The Commission hearing to which the witness has been subpoenaed may be in a district remote from his residence. Under the amendment the Commission may bring the proceeding to force his attendance in the district court of the district of his residence.

Another amendment in this connection (p. 13, line 18) provides that the court may order a witness to appear and testify either before the Commission or "before one of its designated examiners." As a matter of practice, nearly all hearings are presided over by an examiner of the Commission, which the present act authorizes, rather than by a commissioner. The present act empowers the district court to order the witness to appear before "the Commission," and this amendment makes it clear that the court may also order his appearance at a hearing presided over by an examiner. The Commission's examiners conduct hearings throughout the country, and the court will be able to order the appearance of a witness before an examiner sitting at or near the place of residence of the witness instead of having to require his attendance before the Commission, which, as a body, sits only in Washington.

The last paragraph of section 9 relates to immunity of a witness from prosecution in any matter concerning which he may testify in obedience to a subpoena of the Commission. It is proposed to amend this paragraph by providing (p. 15, lines 3-4) that this immunity shall not attach to a witness except where he shall have claimed his privilege prior to testifying or producing evidence. His making the claim prior to actually giving the testimony or producing the evidence would put the Commission on notice that he intends to claim immunity, in time for the Commission to decide whether the public interest would better be served by granting him the immunity or by foregoing his testimony or the production

of evidence by him. This provision is found in the Securities Exchange Act (sec. 78 u (d), title 15, U. S. C. A.).

This report is transmitted to you in duplicate for your convenient use.

By direction of the Commission.

Yours sincerely,

GARLAND S. FERGUSON, Jr.,
Acting Chairman.

[S. Rept. No. 221, 75th Cong., 1st sess.]

AMENDMENTS TO FEDERAL TRADE COMMISSION ACT

The Committee on Interstate Commerce, to whom was referred the bill (S. 1077) to amend sections 1, 4, 5, 6, and 9 of the Federal Trade Commission Act, having considered the same, report the bill back to the Senate, with the recommendation that the bill do pass.

This bill, as reported by your committee, is identical to S. 3744, which was unanimously passed by the Senate on May 4, 1936. Hearings were held on S. 3744 during the Seventy-fourth Congress and the committee made several amendments to S. 3744 as a result. All such amendments and an additional amendment made on the floor of the Senate were adopted by the Senate last year and included in the present S. 1077 which is therefore reported without further amendment.

A brief explanation of the nature of the functions of the Federal Trade Commission will be helpful to the consideration of the amendments under this bill.

Under section 5, unfair methods of competition are declared unlawful and upon complaint the Commission is empowered to investigate and to call the parties before it for a hearing on the complaint. The Commission then either dismisses the complaint, or issues an order against the respondent to cease and desist from the specific trade practice which the Commission finds to be an unfair method of competition under the order.

The procedure is unlike that under the Pure Food and Drug Act or the Postal Statutes, in that it is merely preventive and cooperative rather than penal. An appeal from the order of the Commission can be taken to any circuit court of appeals, and the court, to quote from the Act, "shall have * * * jurisdiction to affirm, set aside, or modify the order of the Commission." If the respondent violates the cease and desist order of the Commission, the latter must go to the court for enforcement of the order, and the same right of review, affirmation, modification, or setting aside is given to the court at this stage of the proceeding, constitutes an unfair method of competition, or, under the proposed legislation,

Under section 5 the Commission is a quasi-judicial body in determining what constitutes an unfair method of competition, or, under the proposed legislation an unfair or deceptive act or practice. This power was given to the Commission under the original act, rather than to attempt to define in the statute all the different unfair practices. On June 13, 1914, the Senate Committee on Interstate Commerce in reporting the bill used the following language:

"The committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid their continuance or whether it would by a general declaration condemning unfair practices, leave it to the Commission to determine what practices were unfair. It concluded that the latter course would be the better, for the reason, as stated by one of the representatives of the Illinois Manufacturers' Association, that there were too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others."

It must be noticed in the above quotation that the committee was concerned with the elimination of unfair practices, and the phrase "unfair methods of competition" was adopted as the expression of policy behind the legislation. However, in the course of the past two decades during which the courts have considered and defined the jurisdiction of the Commission, the judicial construction placed on the words "methods of competition" has forced the Commission to prove competition and injury to competitors before it could order that the unfair methods be stopped.

The committee is of the opinion that the Commission should have jurisdiction to restrain unfair or deceptive acts and practices which deceive and defraud the public generally without being put to the necessity of proving that the competitors of the offender have suffered monetary damage.

It was never the intention of Congress that the Commission should be a forum where private disputes or controversies between competitors should be settled, and the Commission is required to find that a proceeding is in the public interest in order to retain jurisdiction of it. In the case of *Federal Trade Commission v. Klesner*, involving the passing off of one trader's goods for those of another, the Supreme Court held that:

"A complaint may be filed only "if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public." This requirement is not satisfied by proof that there has been misapprehension and confusion on the part of purchasers, or even that they have been deceived the evidence commonly adduced by the plaintiff in "passing off" cases in order to establish the alleged private wrong. It is true that in suits by private traders to enjoin unfair competition by "passing off," proof that the public is deceived is an essential element of the cause of action. This proof is necessary only because otherwise the plaintiff has not suffered an injury. There, protection of the public is an incident of the enforcement of a private right. But to justify the Commission in filing a complaint under 5, the purpose must be protection of the public. The protection thereby afforded to private persons is the incident."

The inevitably sound conclusion is that where it is not a question of a purely private controversy, and where the acts and practices are unfair or deceptive to the public generally, they should be stopped regardless of their effect upon competitors. This is the sole purpose and effect of the chief amendment to section 5.

The remaining amendments to this section are procedural in character and are designed to expedite proceedings for review or enforcement of the Commission's orders in the courts, or to lessen the expense of such proceedings.

SECTIONAL ANALYSIS

First, the bill amends section 4 of the present act which has to do with definitions. Section 4 is amended by including within the definition of "corporation" a trust or so-called Massachusetts trust and by including within the term "documentary evidence" in addition to all documents, papers, and correspondence, "books of account and financial and corporate records." The definition of "anti-trust acts" in this section is further amended by specifically including the Clayton Act, which was approved October 15, 1914, subsequent to the passage of the Federal Trade Commission Act.

Section 5 of the present act declares unlawful unfair methods of competition in commerce, and the pending bill amends that section by also declaring unlawful, unfair or deceptive acts and practices in commerce. Under the present act it has been intimated in court decisions that the Commission may lose jurisdiction of a case of deceptive and similar unfair practice if it should develop in the proceeding that all competitors in the industry practiced the same methods, and the Commission may be ousted of its jurisdiction, no matter how badly the public may be in need of protection from said deceptive and unfair acts. Under the proposed amendment the Commission would have jurisdiction to stop the exploitation or deception of the public, even though the competitors of the respondent are themselves entitled to no protection because of their engaging in similar practices. It further appears that much time and money must now be expended in order to establish competition and to show injury to competitors, as the courts have held that competition and injury to the same must be established in order for the Commission to retain jurisdiction. Under the proposed amendment, if the Commission should have reason to believe that unfair and deceptive acts and practices are being engaged in, and that it is in the public interest that they be stopped, it could issue its restraining order without being put to the necessity of establishing competition and injury to such competition. The necessity of this amendment is made apparent by the decision of the Supreme Court in a case involving deceptive advertising, in which the Commission had issued its order to cease and desist. In that case the court said:

"If the necessity of protecting the public against dangerously misleading advertisements of a remedy sold in interstate commerce were all that is necessary to give the Commission jurisdiction, the order could not successfully be assailed."

In spite of the finding of the Supreme Court that the advertising in question was misleading and dangerous to the public, it held that the Commission had no jurisdiction to order the respondent to cease and desist because it had not been shown that the respondent had competitors who were injured.

Some objection was voiced in the committee to the use of the word "acts" and the suggestion was made that the word "methods" should be substituted

for the word "acts," or that the word "acts" be eliminated entirely. After consideration the committee is of the opinion that, since the powers of the Commission in this respect are injunctive rather than punitive, the Commission should have the power to restrain an unfair act before it had become a method or practice, if, in its discretion, such restraint be in the public interest. A single act may have multiple or continuing effects and may be far reaching.

The other amendments to section 5 of the present law are procedural in character, and are designed to expedite and to lessen the expense of proceedings to review or to enforce the Commission's orders in the courts.

One amendment to section 6 is designed to make clear that the Commission is to exercise its general investigatory powers under paragraph (a) either upon the direction of either house of Congress or the President or upon its own initiative. Persons and partnerships, engaged in interstate commerce, already subject to section 5, are made subject also to section 6 which now extends only to corporations. In no other respect do the amendments of this section extend the investigatory powers of the Commission.

The first amendment to section 9 makes clear that the power to inspect and copy documents in investigations and the power to subpoena witnesses and documents may be exercised when the Commission is proceeding either under section 5 or 6. It is customary to confer this power upon investigatory and fact-finding agencies. It has been conferred upon the Interstate Commerce Commission and upon the Securities and Exchange Commission.

Further, there can be no danger of abuse of the power by the Commission since the command of the subpoena can be enforced only by an order of a district court of the United States.

Another amendment requires that for a natural person to secure immunity from prosecution concerning any matter about which he shall testify he must claim the privilege before giving the testimony or producing the evidence. The purpose of this amendment is that the Commission may be advised that he claims this immunity in time to determine whether the public interest will best be served by foregoing the testimony or the production of evidence, or granting the immunity. A similar provision is contained in the Securities Exchange Act.

Section 5 of the bill is a provision that upon expiration of the term of a commissioner he shall serve until a successor is appointed.

This provision will be found in the Interstate Commerce and other acts, and was adopted as an amendment in the Senate to S. 3744 in the last session.

It is the opinion of the committee that the bill is in the public interest and should be enacted.

The following report on the bill S. 3744 as it was introduced into the Seventy-fourth Congress was received from the Federal Trade Commission (page and line references are not to S. 1077, but to S. 3744 as introduced in the 74th Cong.) :

FEDERAL TRADE COMMISSION,
Washington, February 11, 1936.

HON. BURTON K. WHEELER,

*Chairman, Committee on Interstate Commerce,
United States Senate, Washington, D. C.*

DEAR MR. CHAIRMAN: With further reference to yours of the 4th instant, submitting copy of bill S. 3744, and advising that your committee would appreciate having the views of the Federal Trade Commission on this proposed legislation, I beg to report as follows:

The amendments to the Federal Trade Commission Act embodied in this bill all tend to clear up doubtful points and to expedite proceedings and reduce expense. In the opinion of the Commission the proposed amendments are in the public interest and the bill has the approval of the Commission.

Section 1: This section amends section 4 of the act. The "trust" or so-called Massachusetts trust is included (p. 2, lines 9, 13) in the definition of a corporation. There are some extensive businesses operated under the so-called common law or Massachusetts trust which resembles a corporation in its organization and operation in many particulars. There may be some doubt whether the trust would be considered a company or association.

To the definition of antitrust acts, the Clayton Act is added, (p. 3, line 8). It is one of the antitrust acts but had not been passed at the time the Federal Trade Commission Act was written.

The definition of "documentary evidence" is amended by adding the words, "books of account, financial, and corporate records" (p. 2, line 19). This serves to remove any doubt that such books and records are included in the documentary

evidence which is subject to the Commission's inspection and subpoena under section 9 of the present act. It has been the experience of the Commission that this definition should be clarified by these added words.

Section 2: This section amends section 5 of the present act, first, by adding the words "deceptive acts and practices" (p. 3, lines 14, 20, 24-25), so that the first paragraph would read:

"That unfair methods of competition and deceptive acts and practices in commerce are hereby declared unlawful."

Without these amendatory words, there is a question whether the Commission has jurisdiction of a case of deceptive or other unfair practices where it develops that the offender has no competitor but has a monopoly in his field, or that all competitors in the industry are equally guilty. However much the public interest may be in need of protection in such a case, the Commission may be powerless to give it. In one case involving deceptive advertising in which the Commission had issued its order to cease and desist, the Supreme Court said:

"If the necessity of protecting the public against dangerously misleading advertisements of a remedy sold in interstate commerce were all that is necessary to give the Commission jurisdiction, the order could not successfully be assailed."

In spite of the finding of the court that the advertising in question was misleading and dangerous to the public, it held that the Commission had no jurisdiction to order the respondent to cease and desist because it had not been shown that the respondent had competitors who were injured by the deceptive advertisements.

The fourth paragraph of section 5, as amended by the bill, provides (p. 5, line 7) that the Commission may proceed in the circuit court of appeals for the enforcement of its order whenever it has reason to believe that its order is not being obeyed or is about to be disobeyed. This part of the present act provides that "If such person, partnership, or corporation fails or neglects to obey such order," the Commission may proceed in the circuit court of appeals to enforce its order. In *Federal Trade Commission v. Standard Education Society* (14 Fed. (2d) 947), the seventh circuit court of appeals held that the Commission's application for enforcement first presents the question whether the respondent has failed to obey the order and this fact must be presented and passed upon before the validity of the order is to be considered. However, in the second circuit, in *Federal Trade Commission v. Paul Balme* (23 Fed. (2d) 615), it was held that the question of the violation of the Commission's order is not involved until a valid order has been recognized by the court. A majority of the circuit courts of appeals have followed the interpretation of the second circuit, and the proposed amendment will settle this conflict in harmony with the majority opinion and settle it in such a way that the Commission will not be put to the expense, which in some cases may be great and in all cases will be substantial, of proving the violation of an order that the court may later, in the same proceeding, declare invalid.

It is evident that this amendment will not prejudice any right of the person being proceeded against. The purpose and result of the Commission's application to the circuit court of appeals to affirm or enforce its order is to establish the validity of the order and make the Commission's order the order of the court. Only when the Commission thereafter asks the court to punish the person being proceeded against for violation of the order should the Commission be required to prove that it has been violated. Under the seventh circuit's interpretation the Commission must make that proof both when it asks the court to affirm the order and again when it asks for the punishment of the respondent for a violation of the court's order.

The fourth and fifth paragraphs are further amended (p. 6, line 1: p. 7, line 15), so that either upon an application by the Commission for the enforcement of its order, or upon an application by the respondent to set the Commission's order aside, the circuit court of appeals may enter its order enforcing the Commission's order to the extent that it is affirmed. This amendment makes it clear that while the court has the matter before it, either upon the application of the Commission or upon the application of the person being proceeded against, it may enter its decree commanding obedience to the Commission's order, or, if it modifies the Commission's order, commanding obedience to the modified order. The amendment is in the interest of expeditious enforcement of the law.

The fourth and fifth paragraphs are also amended (p. 6, line 2: p. 7, line 15) to give the circuit court of appeals jurisdiction to issue writs necessary in its judgment to prevent injury to the public or to competitors, pendente lite. Experience has shown that cases may and do arise where the business practice in

question is of such a nature that its continuance during the pendency of the proceedings in the circuit court of appeals will work irreparable injury to the public or competitors. The proceeding in the circuit court of appeals is an original proceeding, but is also in the nature of a review of the Commission's proceedings. Federal courts of original jurisdiction ordinarily have authority to issue temporary injunctions pendente lite, and appellate courts have that power when properly auxiliary to their appellate jurisdiction; but since this is a special proceeding, it appears wise to give the circuit court of appeals express power to restrain the continuance of the unfair method pending final decision, whenever, in its opinion, the public interest requires it.

Precedent for such a provision is found in the Packers and Stockyards Act, 1921. It is provided (sec. 194 (c), title 7, U. S. C. A.) that after appeal has been taken from the Secretary's order to cease and desist to the circuit court of appeals, the court "may issue a temporary injunction restraining, to the extent it deems proper, the packer * * * from violating any of the provisions of the order pending the final determination of the appeal." And in the Securities Exchange Act of 1934 (sec. 78y (b), title 15, U. S. C. A.) it is provided that the commencement of proceedings in the circuit court of appeals to review an order of the Securities and Exchange Commission shall not operate as a stay of the order "unless specifically ordered by the court."

At the end of the fifth paragraph is added a sentence as follows (p. 7, line 19) : "In no case shall it be necessary to establish a violation of the order of the Commission as a condition precedent to the affirmance, modification, or setting aside of the same, or entering an order enforcing it."

This relates back to the first proposed amendment to the fourth paragraph discussed on page 3 hereof, providing that the Commission may make application to the circuit court of appeals to affirm its order whenever it has reason to believe that its order is not being obeyed or is about to be disobeyed.

Paragraph 5 of section 5 is amended (p. 7, lines 6-7) to limit the time to 60 days within which the person being proceeded against may make application to the circuit court of appeals to set aside an order of the Commission. A further amendment provides (p. 7, lines 2, 3) that at the end of this 60 days, if such application shall not have been made, the Commission's order shall become final and conclusive, and fixes a penalty for failure to obey it, recoverable in a civil action by the United States. Under the present act there is no time fixed within which the application must be made and the respondent may, without incurring any liability, continue to use the unfair method until the Commission discovers the fact and secures an enforcement order in the circuit court of appeals. This proposed amendment would prevent a respondent playing fast and loose with the Commission's order, neither obeying it nor asking the court to set it aside.

Such provisions as are embodied in this amendment are not novel. Under the Packers and Stockyards Act of 1921 the procedure before the Secretary of Agriculture, in case of the use by a packer of certain practices declared by the act to be unlawful, is almost identical with the procedure before the Commission under section 5. The Packers Act provides (see sec. 194 (a), title 7, U. S. C.) that an order of the Secretary to cease and desist shall become final after 30 days unless appeal shall have been taken to a circuit court of appeals. And section 195 (1) provides that the violation of his order to cease and desist after the expiration of the 30 days without an appeal shall subject the violator to fine and imprisonment. A similar limit of the time for appeal appears in the Securities Exchange Act (sec. 78y (a), title 15, U. S. C. A.).

The last paragraph of the present section 5 prescribes the method of serving "complaints, orders, and other processes" of the commission; first, by delivering a copy to the person to be served; second, by leaving the copy at his or its principal place of business; or third, by mailing, registered, a copy to his or its principal place of business. In practically every case service by mail is most convenient, expeditious, and economical. But in many cases, particularly where the process to be served is a subpoena, the witness or person to be served has no "place of business." This paragraph is amended to provide (p. 9, lines 2, 6) that process may be served also by registered mail to the residence of the person to be served.

At various places in the present section 5, the word "testimony" instead of "evidence" is used. "Testimony" strictly means oral evidence only, and the broader term "evidence" is evidently intended and has been substituted (p. 5, lines 17, 24; p. 6, lines 6, 21; p. 7, line 18).

Section 3: This section amends section 5 of the act as follows:

First is amended subdivision (a) of section 6 expressly giving the Commission power to proceed either upon its own initiative or upon the direction of the President or either House of Congress (p. 9, line 16). Section 6 contains the Commission's fundamental powers of investigation, and it is desirable to remove any doubt as to whether the exercise of its powers must await the transpiring of some condition precedent, such as the institution of legal proceedings or formal direction to investigate a situation, or whether its powers are available for use in the performance of all its statutory duties.

This subdivision (a) is broadened to include persons and partnerships (p. 9, lines 20, 23) in addition to corporations, within the field of the Commission's power to investigate business practices and conditions in interstate and foreign commerce. It is manifest that unfair, detrimental, or illegal practices affecting or interfering with such commerce may be carried on as well by persons and partnerships as by corporations. This addition of persons and partnerships is carried into other subdivisions of this section (p. 10, lines 1-2, 11-12; p. 11, lines 1-2, 11; p. 12, lines 4-5), and into section 9 (p. 12, lines 17, 22-23) for the same reason.

Subsection (i), a new subsection (p. 12, lines 7-10) confers upon the Commission so much of the auxiliary powers of Congress to obtain information in aid of legislation, as may be necessary to enable the Commission to carry out its duties under the section. In *Humphrey's Executor v. U. S.* (295 U. S. 602), the Supreme Court said (p. 628):

"The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute, * * * and to perform other specified duties as a legislative or as a judicial aid. * * * In making investigations and reports thereon for the information of Congress under section 6, in aid of the legislative power, it acts as a legislative agency."

Since Congress has imposed upon the Commission the duty to make these investigations as its legislative aide, it undoubtedly intended to give it the necessary power to proceed.

Section 4: This section amends section 9 of the present act, which relates to evidence, testimony, and witnesses. There has been doubt and confusion on the question whether, and to what extent, the power of subpoena conferred by section 9 applies to investigations under section 6. In the *Miller's National Federation case* (decided Sept. 22, 1926) the Supreme Court of the District of Columbia held that the power of the Commission to compel the attendance and testimony of witnesses and the production of documentary evidence is limited to formal proceedings under section 5 and has no application to investigations under section 6. The Court of Appeals of the District upheld the Commission's power of subpoena in investigations under section 6, where it was proceeding pursuant to a resolution of the Senate, but it seems to base its decision upon the ground that the resolution of the Senate was tantamount to a delegation of the power vested in the Senate itself. Under this ruling, the Commission would have no such power when proceeding on its own initiative, under section 6.

In the *Electric Bond & Share case* (34 Fed. (2d) 323), the United States District Court for the Southern District of New York sustained the power of the commission to issue subpoena for the attendance of witnesses for oral testimony, but circumscribed and limited its power to subpoena documentary evidence, when pursuing an investigation under section 6.

The proposed amendment is clarifying and removes the uncertainty arising out of the foregoing decisions, by expressly conferring upon the Commission the power, as was originally intended, to subpoena witnesses for oral testimony and to examine and subpoena documentary evidence, when it is proceeding either under section 5 or section 6 (p. 13, lines 22-25). It is customary to confer this power upon investigatory and fact-finding agencies. It is conferred upon investigating committees of Congress, and section 19 (b) of the Securities Act of 1933 (carried into the Securities Exchange Act of 1934) provides:

"For the purpose of all investigations which, in the opinion of the Commission, are necessary and proper for the enforcement of this title, any member of the Commission, or any officer or officers designated by it, are empowered to * * * subpoena witnesses * * * and require the production of any books, papers, or other documents, which the Commission deems relevant or material to the inquiry."

The same power is given the Interstate Commerce Commission "and for the purposes of this chapter, the Commission shall have power to require, by subpoena, the attendance and testimony of witnesses and the production of any books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation (sec. 12, title 49, U. S. C. A.)."

Further, there can be no danger of abuse of the power by the Commission since the command of the subpoena can be enforced only by an order of a district court of the United States (see p. 13, lines 12-13, 24-25).

The third paragraph of section 9 is amended (p. 13, lines 15-16) so that in a case of contumacy or refusal to obey a subpoena a proceeding to enforce obedience may be brought in any United States district court in which the person resides, or carries on business, or is found. Under the present act, the jurisdiction is confined to the district court of the district in which the Commission's inquiry is being carried on. This amendment is to the convenience both of the Commission and members of the public who may be subpoenaed. The Commission hearing to which the witness has been subpoenaed may be in a district remote from his residence. Under the amendment the Commission may bring the proceeding to force his attendance in the district court of the district of his residence.

Another amendment in this connection (p. 13, line 18) provides that the court may order a witness to appear and testify either before the Commission or "before one of its designated examiners." As a matter of practice, nearly all hearings are presided over by an examiner of the Commission which the present act authorizes, rather than by a commissioner. The present act empowers the district court to order the witness to appear before "The Commission," and this amendment makes it clear that the court may also order his appearance at a hearing presided over by an examiner. The Commission's examiners conduct hearings throughout the country, and the court will be able to order the appearance of a witness before an examiner sitting at or near the place of residence of the witness instead of having to require his attendance before the Commission, which, as a body, sits only in Washington.

The last paragraph of section 9 relates to immunity of a witness from prosecution in any matter concerning which he may testify in obedience to a subpoena of the Commission. It is proposed to amend this paragraph by providing (p. 15, lines 3-4) that this immunity shall not attach to a witness except where he shall have claimed his privilege prior to testifying or producing evidence. His making the claim prior to actually giving the testimony or producing the evidence would put the Commission on notice that he intends to claim immunity, in time for the Commission to decide whether the public interest would better be served by granting him the immunity or by foregoing his testimony or the production of evidence by him. This provision is found in the Securities Exchange Act (sec. 78u (d), title 15, U. S. C. A.).

This report is transmitted to you in duplicate for your convenient use.

By direction of the Commission.

Yours sincerely,

GARLAND S. FERGUSON, JR.,
Acting Chairman.

[H. Rept. No. 1613, 75th Cong., 1st sess.]

EXTENSION OF FEDERAL TRADE COMMISSION'S AUTHORITY OVER UNFAIR ACTS AND PRACTICES AND FALSE ADVERTISING OF FOOD, DRUGS, DEVICES, AND COSMETICS

The Committee on Interstate and Foreign Commerce, to whom was referred the bill (S. 1077) to amend the act creating the Federal Trade Commission, to define its powers and duties, and for other purposes, having considered the same, report favorably thereon, with an amendment and recommend that the bill as amended, do pass.

The amendment consists of striking out all after the enacting clause and inserting a substitute bill.

The bill as passed by the Senate amended sections 1, 4, 5, 6, and 9 of the Federal Trade Commission Act. As reported here it amends only section 5 of the present act, and adds new sections, not in the Senate bill, dealing with control of advertising of food, drugs, devices, and cosmetics. The amendments to sections 1, 4, 6, and 9 were not included by this committee as it was felt that there was no pressing need for them at this time.

GENERAL PURPOSE OF PROPOSED LEGISLATION

Outside of procedural matters there are two general purposes of this legislation.

The first is to broaden the powers of the Federal Trade Commission over unfair methods of competition by extending its jurisdiction to cover unfair or deceptive acts or practices in commerce.

The second general purposes is to provide the Commission with more effective control in the exercise of its jurisdiction over false advertisements of food, drugs, devices, and cosmetics.

AMENDMENTS PROPOSED

More specifically, it is proposed to amend section 5 of the Federal Trade Commission Act and add several new sections to said act.

The proposed amendments to section 5 are:

(1) An amendment making "unfair or deceptive acts or practices in commerce" unlawful.

(2) An amendment making an order of the Commission to cease and desist final upon the expiration of the time allowed for filing a petition for review, if no such petition has been filed within such time.

(3) Procedural amendments fixing the time when the Commission's orders to cease and desist shall become final where they are reviewed by the courts.

(4) A provision fixing a civil penalty of not to exceed \$5,000 for each violation of an order of the Commission to cease and desist, after such order has become final and while it is in effect.

(5) A provision exempting from the act persons subject to the Packers and Stock Yard Act, 1921, except as provided in said act.

The amendments to the Federal Trade Commission Act by way of new sections are:

(1) Section 12, which prohibits dissemination of any false advertisement, through the mails or in commerce, for the purpose of inducing, or which is likely to induce the purchase of food, drugs, devices, or cosmetics; or the dissemination of any such advertisement, by any means, for the purpose of inducing, or which is likely to induce, the purchase in commerce of such commodities.

(2) Section 13, which authorizes, in certain cases, the enjoining of the dissemination of such advertisements pending the issuance of and action upon a complaint by the Commission and its review by the courts.

(3) Section 14, which provides that a violation of section 12 shall, if the use of the commodity advertised may be injurious to health because of results from such use, or if such violation is with intent to defraud or mislead, be a misdemeanor, punishable by a fine of not more than \$5,000 or by imprisonment for not more than 6 months, or by both such fine and imprisonment; with the further proviso that if the conviction is for a violation committed after a first conviction the fine be not more than \$10,000, and imprisonment not more than 1 year, or both.

(4) Section 15, which defines the terms "false advertisement," "food," "drugs," "device," and "cosmetic."

(5) Section 16, which provides that whenever the Commission has reason to believe that any person, partnership, or corporation is liable to a penalty under section 14 or under subsection (1) of section 5, it shall certify the facts to the Attorney General, whose duty it shall be to cause appropriate proceedings to be brought for the enforcement of the provisions of such section or subsection.

(6) Sections 17 and 18, which provide the usual separability clause and fix the date when certain provisions of the act are to take effect.

UNFAIR OR DECEPTIVE ACTS OR PRACTICES IN COMMERCE

The Federal Trade Commission Act has not been amended since its passage in 1914. The experience of the Commission has demonstrated the need of broader powers and more effective procedural methods such as are proposed in this bill.

The words "unfair methods of competition" in section 5 have been construed by the Supreme Court as leaving the Commission without jurisdiction to issue cease and desist orders where the Commission has failed to establish the existence of competition. In other words, the act is construed as if its purpose were to protect competitors only and to afford no protection to the consumer without showing injury to a competitor. Thus, if a person, partnership, or corporation

has a monopoly in a certain field, so that there is no competitor, his acts, no matter how deceptive or misleading and unfair to the consuming public, may not be restrained. Similarly, where all of those engaging in a particular line of commerce are participating in the same unfair method, the Commission may be powerless to act for consumer's protection.

In a recent case involving the alleged false and deceptive advertising of a drug, where the Commission had issued its order to cease and desist, the Court said:

"If the necessity of protecting the public against dangerously misleading advertisements of a remedy sold in interstate commerce were all that is necessary to give the Commission jurisdiction, the order could not successfully be assailed (*Federal Trade Commission v. Raladam Co.*, 283 U. S. 643)."

In that case the Court further stated that although two of the three essentials to jurisdiction were present namely, (1) that the methods complained of were unfair, and (2) that a proceeding by the Commission to prevent the use of the methods appeared to be in the interest of the public, the Commission was deprived of jurisdiction to proceed because it had not established the third essential, namely, that the unfair methods in question were "methods of competition in commerce."

By the proposed amendment to section 5, the Commission can prevent such acts or practices which injuriously affect the general public as well as those which are unfair to competitors. In other words, this amendment makes the consumer, who may be injured by an unfair trade practice, of equal concern, before the law, with the merchant or manufacturer injured by the unfair methods of a dishonest competitor.

This amendment will also enable the Commission to act more expeditiously and save time and money now required to show actual competition and the injurious effect thereon of the unfair methods in question.

At the present time, both the investigation of unfair methods of competition and in actual proceedings after the issuance of a formal complaint, the Commission must develop this jurisdictional prerequisite, even though the methods or practices involve representations that are flagrantly false or deceptive and dangerously injurious to the purchasing or consuming public.

Representatives of the Commission appearing before the committee stated that competition and injury to a competitor can be established in almost every case, but that considerable time and money must be expended in many cases in order to do so. Since it is the purpose of Congress to protect the consumer as well as the honest competitor, the Commission should be empowered to prevent the use of unfair or deceptive acts or practices in commerce, regardless of whether such acts or practices injuriously affect a competitor.

The provision exempting persons subject to the Packers and Stockyards Act except as provided in that act conforms to the existing practice and assures no change in view of the amendments to the Federal Trade Act. The Federal Trade Commission would retain its existing jurisdiction under the provisions of the Stockyards Act.

PROCEDURE AND PENALTIES

The provisions of subsections (g) to (k) of section 5, inclusive, are for the purpose of making definite and certain when the Commission's orders to cease and desist become final, and are similar to those found in the Revenue Act of 1926, fixing the time when the orders of the Board of Tax Appeals become final.

Subsection (1) provides that any person, partnership, or corporation who fails to obey an order of the Commission to cease and desist after it has become final, and while it is in effect, shall forfeit and pay to the United States a civil penalty of not more than \$5,000 for each violation, which shall accrue to the United States and may be recovered by a civil action brought by the United States. The object of the provision is to enforce obedience to the Commission's orders to cease and desist after such orders have become final through approval of the courts or through the failure of respondents to seek review. Similar provisions are contained in the Packers and Stockyards Act of 1921 (sec. 195, title 7, U. S. C. A.) and in the Securities Exchange Act of 1934 (sec. 78y (a), title 15, U. S. C. A.).

ADVERTISEMENTS

Salesmanship and advertising are inextricable from the promotion and operation of business under our economic system. They have the common purpose of inducing the purchase of the seller's product. It is the case of the advocate

boosting his own cause. Common experience discounts statements of a zealous advocate and weighs his declarations in the light of his own self-serving financial purposes. Reasonable latitude must be conceded to the salesman and advertiser in boosting his own product.

It is not the purpose of this committee to ignore the realities of this situation.

On the other hand, we cannot ignore the evils and abuses of advertising; the imposition upon the unsuspecting; and the downright criminality of preying upon the sick as well as the consuming public through fraudulent, false, or subtle misleading advertisements.

The need of amending the existing act to give the Federal Trade Commission more effective control over advertising as an unfair practice, is urgent and manifest.

The provisions of this bill covering false advertising are far reaching but we believe entirely warranted, necessary for the effective control of illegitimate advertising and yet drawn with due regard to the rights of legitimate advertising. We believe the legislation is based on necessity and sound reason and that due discrimination has been made in applying penalties to fit the varying magnitude of the offenses involved.

AMENDMENTS AS TO ADVERTISING

Among the most obvious needs of the Federal Trade Commission Act are those of giving more effective control of advertisements affecting the public health and fraudulent impositions as to its food and medicinal supplies.

The advertisement amendments to this bill revolve around the definition of a "false advertisement" in section 15. A false advertisement is defined as one "which is misleading in a material respect." Certain specified matters are to be considered in determining whether or not an advertisement is misleading. This definition is very broad. It will be noted that a fraudulent intent is not a necessary element of a false advertisement. The essential elements of a false advertisement are that it is misleading, and misleading in a material respect. It places on the advertiser the burden of seeing that his advertisement is not misleading.

The definition is broad enough to cover every form of advertisement deception over which it would be humanly practicable to exercise governmental control. It covers every case of imposition on a purchaser for which they could be a practical remedy. It reaches every case from that of inadvertent or uninformed advertising to that of the most subtle as well as the most vicious types of advertisement.

Obviously, a definition to be applied to the infinite variety of advertisements disseminated regarding thousands of different foods, drugs, devices, and cosmetics must be general in its terms. There will be difficulties and uncertainties of interpretation just as there have been in the case of provisions of the Federal Trade Commission Act, the Food and Drug Act, and the antitrust laws, and other laws prescribing in general terms standards of conduct to be applied to innumerable factual situations. These difficulties are inherent in the problem but should not prevent necessary and adequate consumer protection.

It will be observed that it is not mandatory on the advertiser to state anything. The only requirement is in case he does advertise, he shall not make statements that are misleading in a material respect.

It is incumbent on the advertiser to reveal facts material in the light of representations made in the advertisement.

The Federal Trade Commission has the machinery and trained personnel to investigate in a proceeding against false advertising of all industries and all commodities. The common motive of false advertisement is the same in every line of industry, to gain an economic advantage through defrauding or misleading the purchaser. This method of protecting the public should be harmonized and unified under one organization with consistent and uniform methods of enforcement and penalization. Efficiency, uniformity, and economy suggest this course. This legislation is framed with that purpose in mind.

The Federal Trade Commission as an independent quasi-judicial body, has a procedure better calculated to handle multitudinous types of advertising and to do its work to the greater confidence and satisfaction of the public than any purely administrative body. Its work carries with it the combined elements of searching investigation, orderly procedure, prevention rather than penalization in minor cases, and that judicial fairness that is essential to the enlistment of confidence by the public.

FITTING PENALTIES TO THE OFFENSE

Having adopted this far-reaching definition of false advertisements, your committee attempted, so far as practicable, to provide remedies and penalties therefor in proportion to the offenses involved.

Manifestly all the various types and degrees of offenders under such a broad definition could not justly be placed in one common mold for the purpose of penalization. Therefore, the committee has recommended the different procedures and penalties provided in this act.

For the offender whose transgression is trivial, inadvertent, or innocent of law-offending purpose, the regular procedure of the Federal Trade Commission through a cease-and-desist order can be followed. The discretion that the Commission has under its direction to act where it appears to the Commission "that a proceeding by it in respect thereof would be to the interest of the public" will permit the effective and simple handling of this vast class of minor infractions. Such a procedure is particularly fitting where the accused is without wrongful purpose and desirous of conducting his business in compliance with the law.

In cases where the accused persists in the dissemination of a misleading advertisement after complaint, the Commission is given a prompt method of procedure to prevent the continuance of the offense by a temporary injunction issued by the court under section 13. For proper cause shown, this injunctive process can apply against a threatened dissemination of the advertisement and can be broad enough to prevent evasions of the order through technical changes in advertisements.

The amendments proposed further provide for a more effective prevention of misleading advertisements by procedural changes under cease-and-desist orders as now practiced. The order of the Commission would definitely become final as provided in section 5 and become operative as to further transgressions without the initiation of new proceedings as now required after the violation occurs.

Under section 5 (1) as amended, a violation of a cease-and-desist order after it becomes final will entail a civil penalty of not more than \$5,000 for each violation.

To cover the grosser cases of false advertising, in addition to existing penalties, it is provided in section 14 that where the advertisement is to induce the purchase of an article which may be injurious to health because of the result of such use, and also in cases where such advertisement is with intent to defraud or mislead, the offense shall be prosecuted as a crime and punishable by imprisonment for not more than 6 months or a fine of not more than \$5,000 or by both. For a second offense after a first conviction, the penalty is a fine of not more than \$10,000 or imprisonment by not more than 1 year or both.

These criminal offenses will not be prosecuted by the Federal Trade Commission, but through the Department of Justice. The Commission will report the facts to the Attorney General for appropriate proceedings.

The dissemination of such false advertisements is declared to be an unfair or deceptive act or practice in commerce within the meaning of section 5 of the Federal Trade Commission Act.

Food, drugs, devices, and cosmetics are within the terms of these advertising sections.

Speaking generally, "devices" within the terms of the act means instruments and contrivances intended for use in the cure or treatment of disease.

"Devices" are included within the bill because of their close association with drugs as a means for the treatment of physical ills.

"Cosmetics" are brought within the provisions of the bill because in many instances cosmetics are injurious to health and produce physical injuries to the body.

Disseminators of advertisements including publishers and radio broadcasters are afforded a proper exemption under section 14 (b) as to avoid unwarranted hardship on the person who has conducted his business with proper prudence.

OPINION EVIDENCE

A problem of some difficulty exists in the case of advertisements where there are differences of opinion. Perhaps the problem is most acute in the case of claims regarding the curative effect of drugs. The difficulty has two aspects—one of policy and the other of congressional power.

As to the policy, there is no intention to punish an advertiser for making a statement which he had good reason to believe was true, if made in such manner

as to be not misleading. On the other hand, it is not desired to permit an advertiser to make a representation as to therapeutic effect, for example, in such manner as to be misleading, merely because he can find some expert opinion to support his claim.

As to the legal problem, it is a well-known principle of law that a statute providing punishment for the commission of an offense must describe the offense with a reasonable degree of certainty. There are clear implications in cases arising under the Food and Drugs Act of June 30, 1906, that Congress may not penalize the making of a statement or representation regarding the truth of which, qualified opinion differs (*Seven Cases v. United States*, 239 U. S. 510; *United States v. Johnson*, 221 U. S. 488). See also *American School of Magnetic Healing v. McAnnulty* (187 U. S. 94).

The reason for this limitation on the power of Congress is apparent. Whether an advertisement would be misleading in a material respect and thus be a false advertisement, would depend, in a prosecution, on whether the jury found it to be misleading.

If Congress were to provide that a representation, as to the correctness of which qualified opinion differed, would be misleading if the jury agreed with the experts holding one view, but not misleading if the jury agreed with the experts holding the other view, it will be seen that the advertiser would not be able to tell in advance whether his advertisement violated the statute. There would therefore exist the kind of uncertainty which would invalidate the statute. On the other hand, it is undesirable to permit misleading claims to be made simply because experts can be found to substantiate them.

It is in the light of these considerations that the committee on the advice of the House Legislative Counsel, included in the definition of "false advertisement" the following provision: "but if, at the time of the dissemination of the advertisement, there exists a substantial difference of opinion, among experts qualified by scientific training and experience, as to the truth of a representation, the advertisement shall not be considered misleading on account of such representation, if it states clearly and prominently the fact of such difference of opinion. Nothing in this paragraph shall be construed as requiring the making of such statement as to difference of opinion; and failure to so state the fact of such difference of opinion shall not relieve the Government of the burden of establishing the misleading character of the representation."

This provision does not increase the burden of the accused in making his defense, but affords him an opportunity for his own protection where uncertain as to his rights.

What this provision does is to afford the advertiser a means of knowing how he can, with certainty, establish his innocence under the statute, thus removing the danger of invalidity growing out of alleged uncertainty. It applies only in the narrow class of cases where such a difference of opinion exists, and it does not, it should be noted, require the inclusion in the advertisement of a statement as to the difference of opinion. Whether or not such a statement is included, the basic question as to whether the advertisement is misleading always remains to be determined.

It is to be noted that the difference of opinion involved is one existing at the time the advertisement is disseminated. Therefore, if it is necessary to establish in court the existence of such a difference of opinion, it will be done by testimony as to the state of expert opinion on the question at the time of the dissemination and not by testimony as to the state of expert opinion at the time of the trial or by testimony of individual experts as to their opinion regarding the truth of the representation. There is no obligation on the advertiser to publish a statement that there is a difference of opinion as to the product he advertises. He may avail himself of such a defense if he desires to do so. Whether or not he does so does not relieve the Government of carrying its burden of establishing the misleading character of the false advertisement. Thus the misleading character of the representation will be a burden for the prosecution to prove in every case and the truthfulness of the representation may be a defense in every case.

"TO THE INTEREST OF THE PUBLIC"

Under section 5 action by the Federal Trade Commission is taken in those cases where it appears to the Commission that a proceeding is "to the interest of the public."

The elucidation of this language by the Supreme Court in *Federal Trade v. Klesner* (280 U. S. 19), is enlightening. In that case the Court, speaking through Justice Brandeis, said:

"In determining whether a proposed proceeding will be in the public interest the Commission exercises a broad discretion. But the mere fact that it is to the interest of the community that private rights shall be respected is not enough to support a finding of public interest. To justify filing a complaint the public interest must be specific and substantial. Often it is so, because the unfair method employed threatens the existence of present or potential competition. Sometimes, because the unfair method is being employed under circumstances which involve flagrant oppression of the weak by the strong. Sometimes, because, although the aggregate of the loss entailed may be so serious and widespread as to make the matter one of public consequence, no private suit would be brought to stop the unfair conduct, since the loss to each of the individuals affected is too small to warrant it.

* * * * *

"Its preliminary determination that institution of a proceeding will be in the public interest, while not strictly within the scope of that provision, will ordinarily be accepted by the courts. But the Commission's action in authorizing the filing of a complaint, like its action in making an order thereon, is subject to judicial review. The specific facts established may show, as a matter of law, that the proceedings which it authorized is not in the public interest, within the meaning of the act. If this appears at any time during the course of the proceeding before it, the Commission should dismiss the complaint."

SENATE AMENDMENTS

This bill, as it passed the Senate, contained amendments to several sections of the Federal Trade Commission Act other than section 5 and which are omitted from the bill as now reported. It developed at the hearing some of these amendments were highly controversial, and of doubtful, if of any value. Some of them excited controversies that might impede legislation on this subject and did not seem of sufficient consequence to justify their inclusion. The bill as proposed to be amended by the House committee carries out, and we believe, improves, the substantial amendments proposed by the Senate to section 5.

To summarize, this legislation is needed to give the Federal Trade Commission jurisdiction over unfair acts and practices for consumer protection; to relieve the Government of unnecessary time and expense in proving an injury to a competitor as a prerequisite to consumer protection and to the suppression of an unfair method in commerce, and to give more effective and necessary control over false advertisements of food, drugs, devices, and cosmetics.

The legislation seeks to establish no new bureaus or to take on new fields of activities, but rather to provide more effective methods of accomplishing that, which broadly speaking, are the purposes of the existing law.

CHANGES IN EXISTING LAW

In compliance with paragraph 2a of Rule XIII of the Rules of the House of Representatives, changes in the Federal Trade Commission Act of September 26, 1914, made by the bill as passed the Senate are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman) :

"AN ACT To create a Federal Trade Commission, to define its powers and duties, and for other purposes

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a commission is hereby created and established, to be known as the Federal Trade Commission (hereinafter referred to as the commission), which will be composed of five commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. Not more than three of the commissioners shall be members of the same political party. The first commissioners appointed shall continue in office for terms of three, four, five, six, and seven years, respectively, from the date of the taking effect of this Act, the term of each to be designated by the President, but their successors shall be appointed for terms of seven years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the commissioner whom he shall succeed: Provided, however, That upon the expiration of his term of office a Commissioner shall continue to serve until his successor shall have been appointed and shall have qualified. The commission shall choose a

chairman from its membership. No commissioner shall engage in any other business, vocation, or employment. Any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. A vacancy in the commission shall not impair the right of the remaining commissioners to exercise all the powers of the commission.

"The commission shall have an official seal, which shall be judicially noticed.

* * * * *

"SEC. 4. **[That the]** *The words defined in this section shall have the following meaning when found in this Act, to wit:*

" 'Commerce' means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.

" 'Corporation' **[means any company or association]** *shall be deemed to include any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members, and has shares of capital or capital [stock, and any company] stock or certificates of interest and any company, trust so-called Massachusetts trust, or association, incorporated or unincorporated, without shares of capital or capital [stock,] stock or certificates of interest, except partnerships, which is organized to carry on business for its own profit or that of its members.*

" 'Documentary evidence' **[means]** *includes all documents, papers, [and correspondence in existence at and after the passage of this Act] correspondence, books of account, and financial and corporate records.*

" 'Acts to regulate commerce' means the Act entitled 'An Act to regulate commerce', approved February 14, 1887, and all Acts amendatory thereof and supplementary thereto and the Communications Act of 1934 and all Acts amendatory thereof and supplementary thereto.

" 'Antitrust Acts' means the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies', approved July 2, 1890; also **[the]** sections 73 to 77, inclusive, of an Act entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes', approved August 27, 1894; **[and]** also the Act entitled 'An Act to amend sections 73 and 76 of the Act of August 27, 1894, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes"', approved February 12, 1913; and also the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes', approved October 15, 1914.

"Sec. 5. That unfair methods of competition in commerce, and unfair or deceptive acts and practices in commerce, are hereby declared unlawful.

"The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce and unfair or deceptive acts and practices in commerce.

"Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair **[methods]** *method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the **[facts.] facts** and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. Until a transcript of the record in such **[hearing]** *hearings* shall have been filed in a circuit court of appeals of the United States, as hereinafter provided, the*

Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

“**[If such person, partnership, or corporation fails or neglects to obey]** *Whenever the Commission shall have reason to believe that such person, partnership, or corporation has failed or neglects to obey, or intends or is about to disobey, such order of the Commission while the same is in effect, the Commission may apply to the circuit court of appeals of the United States, within any circuit where the method of competition [or the act or practice] in question was used or where such person, partnership, or corporation resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the [testimony] evidence taken and the report and order of the Commission. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, partnership, or corporation and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, [testimony,] evidence, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed, and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by [testimony,] evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by [testimony,] evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon [certiorari] certiorari, as provided in section 240 or the Judicial Code.*

“Any party required by such order of the Commission to cease and desist from using such method of competition or such act or practice may obtain a review of such order in said circuit court of appeals by filing in the [court] court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith served upon the Commission, and thereupon the Commission forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the Commission and to enforce same and to issue such writs as in the case of an application by the Commission for the enforcement of its order, and the findings of the Commission as to the facts, if supported by [testimony,] evidence, shall in like manner be conclusive. *In no case shall it be necessary to establish a violation of the order of the Commission as a condition precedent to the affirmance, modification, or setting aside of the same or entering an order enforcing it.*

“*At the end of sixty days from the date of service of any order to cease and desist of the Commission, such order shall become final and conclusive against any person, partnership, or corporation subject thereto failing or neglecting during such sixty-day period to seek court review of such order as provided in this Act as amended; and in case any such person, partnership, or corporation shall fail or neglect to obey such order after the same shall have become final and conclusive and while the same is in effect, such person, partnership, or corporation shall be liable to a penalty of \$500 for each such offense and of \$25 for each day it continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.*

“The jurisdiction of the circuit court of appeals of the United States to affirm, enforce, [set aside, or modify] modify, or set aside orders of the Commission shall be exclusive.

"Such proceedings in the circuit court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the Commission or judgment of [the] court to enforce the same shall in any wise relieve or absolve any person, partnership, or corporation from any liability under the antitrust Acts.

"Complaints, orders, and other processes of the Commission under this section may be served by anyone duly authorized by the Commission, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the *residence* or the principal office or place of business of such person, partnership, or corporation; or (c) by registering and mailing a copy thereof addressed to such person, partnership, or corporation at his or its *residence* or principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post-office receipt for said complaint, order, or other process registered and mailed as aforesaid shall be proof of the service of the same.

"SEC. 6. That the Commission shall [also] have power—

"(a) [To] *Upon the direction of the President or either House of Congress, or upon its own initiative*, to gather and compile information concerning, and to investigate from time to time the organization, [business,] *business* conduct, *business* practices, and *business* management of any person, partnership, or corporation engaged in commerce, excepting [banks] *banks*, and common carriers subject to the Act to regulate commerce, and [its] *the relation of such person, partnership, or corporation, to other individuals, partnerships, and corporations* [and to individuals, associations, and partnerships].

"(b) To require, by general or special orders, *persons, partnerships, or corporations* engaged in commerce, excepting banks, and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the Commission in such form as the Commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the Commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective *persons, partnerships, and corporations* filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the Commission may prescribe, and shall be filed with the Commission within such reasonable period as the Commission may prescribe, unless additional time be granted in any case by the Commission."

NOTE.—Subsection (c) of the existing law becomes subsection (f) by the amendment made to existing law by this bill.

"[h] (c) To investigate, from time to time, trade conditions in and with foreign countries where associations, combinations, or practices of manufacturers, merchants, or traders, or other conditions, may affect the foreign trade of the United States, and to report to Congress thereon, with such recommendations as it deems advisable.

"(d) Upon the direction of the President or either House of [Congress] *Congress*, to investigate and report the facts relating to any alleged violations of the Antitrust Acts by any *person, partnership, or corporation*.

"(e) Upon the application of the Attorney General, to investigate and make recommendations for the readjustment of the business of any *person, partnership, or corporation* alleged to be violating the Antitrust Acts, in order that the corporation may thereafter maintain *his* or its organization, management, and conduct of business in accordance with law.

"[(c)] (f) Whenever a final decree has been entered against any defendant *person, partnership, or corporation* in any suit brought by the United States to prevent and restrain any violation of the Antitrust Acts, to make investigations, upon its own initiative, of the manner in which the decree has been or is being carried out, and upon the application of the Attorney General it shall be its duty to make such investigation. It shall transmit to the Attorney General a report embodying its findings and recommendations as a result of any such investigation, and the report shall be made [public] *public*, in the discretion of the Commission.

"[(f)] (g) To make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest; and to make annual and special reports to the Congress and to submit therewith recommendations for additional legis-

lation; and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use.

"[(g)] (h) From time to time to classify [corporations] *persons, partnerships, or corporations*, and to make rules and regulations for the purpose of carrying out the provisions of this Act."

* * * * *

NOTE.—Subsection (b) of the existing law becomes subsection (c) by the amendment made to existing law by the bill.

"SEC. 9. That for the purposes of this Act the Commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to [copy] *copy*, any documentary evidence of any *person, partnership, or corporation* being investigated *pursuant to the authority conferred upon the Commission by section 6 hereof or being proceeded against*; and the Commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all [such] documentary evidence relating to any matter [under investigation] *or any person, partnership, or corporation being investigated by it under section 6 hereof, or relating to any matter which is the subject of a proceeding under section 5 hereof*. Any member of the Commission may sign subpoenas, and members and examiners of the Commission may administer oaths and affirmations, examine witnesses, and receive evidence.

"Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the Commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

"[Any] *In case of contumacy or refusal to obey a subpoena issued to any person or corporation, any of the district courts of the United States within the jurisdiction of which such inquiry is carried on [may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person,] or in which the corporation or person guilty of contumacy or refusal to obey resides or carries on business or is found, may issue an order requiring such corporation or [other] person to appear before the Commission, or before one of its designated examiners, and to produce documentary evidence if so ordered, or there to give evidence touching the matter in question; and any failure to obey any such order of the court may be punished by [such] said court as a contempt thereof.*

"Upon the application of the Attorney General of the United States, at the request of the Commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of this Act or any order of the Commission made in pursuance thereof.

"The Commission may order testimony to be taken by deposition in any proceeding or investigation pending under this Act at any stage of such proceeding or investigation. Such depositions may be taken before any person designated by the Commission and having power to administer oaths. Such testimony shall be reduced to writing by the person taking the deposition, or under his direction, and shall then be subscribed by the deponent. Any person may be compelled to appear and depose and to produce documentary evidence in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the Commission as hereinbefore provided.

"Witnesses summoned before the Commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

"No person shall be excused from attending and testifying or from producing documentary evidence before the Commission or in obedience to the subpoena of the Commission on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no natural person *having claimed his privilege against self-incrimination prior to so testifying or actually producing such evidence* shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before the Commission in obedience to a subpoena issued by it: *Provided, That no natural person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.*"

For the information of the House, changes made in the Federal Trade Commission Act of September 26, 1914, made by the bill as reported to the House are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman) :

"AN ACT To create a Federal Trade Commission, to define its powers and duties, and for other purposes

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a commission is hereby created, and established, to be known as the Federal Trade Commission (hereinafter referred to as the commission), which shall be composed of five commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. Not more than three of the commissioners shall be members of the same political party. The first commissioners appointed shall continue in office for terms of three, four, five, six, and seven years, respectively, from the date of the taking effect of this Act, the term of each to be designated by the President, but their successors shall be appointed for terms of seven years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the commissioner whom he shall succeed. The commission shall choose a chairman from its membership. No commissioner shall engage in any other business, vocation, or employment. Any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. A vacancy in the commission shall not impair the right of the remaining commissioners to exercise all the powers of the commission.

"The commission shall have an official seal, which shall be judicially noticed.

"SEC. 2. That each commissioner shall receive a salary of \$10,000 a year, payable in the same manner as the salaries of the judges of the courts of the United States. The commission shall appoint a secretary, who shall receive a salary of \$5,000 a year, payable in like manner, and it shall have authority to employ and fix the compensation of such attorneys, special experts, examiners, clerks, and other employees as it may from time to time find necessary for the proper performance of its duties and as may be from time to time appropriated for by Congress.

"With the exception of the secretary, a clerk to each commissioner, the attorneys, and such special experts and examiners as the commission may from time to time find necessary for the conduct of its work, all employees of the commission shall be a part of the classified civil service, and shall enter the service under such rules and regulations as may be prescribed by the commission and by the Civil Service Commission.

"All of the expenses of the commission, including all necessary expenses for transportation incurred by the commissioners or by their employees under their orders, in making any investigation, or upon official business in any other places than in the city of Washington, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the commission.

"Until otherwise provided by law, the commission may rent suitable offices for its use.

"The Auditor for the State and other Departments shall receive and examine all accounts of expenditures of the commission.

"SEC. 3. That upon the organization of the commission and election of its chairman, the Bureau of Corporations and the offices of Commissioner and Deputy Commissioner of Corporations shall cease to exist; and all pending investigations and proceedings of the Bureau of Corporations shall be continued by the commission.

"All clerks and employees of the said bureau shall be transferred to and become clerks and employees of the commission at their present grades and salaries. All records, papers, and property of the said bureau shall become records, papers, and property of the commission, and all unexpended funds and appropriations for the use and maintenance of the said bureau, including any allotment already made to it by the Secretary of Commerce from the contingent appropriation for the Department of Commerce for the fiscal year nineteen hundred and fifteen, or from the departmental printing fund for the fiscal year nineteen hundred and fifteen, shall become funds and appropriations available to be expended by the commission in the exercise of the powers, authority, and duties conferred on it by this Act.

"The principal office of the commission shall be in the city of Washington, but it may meet and exercise all its powers at any other place. The commission may, by one or more of its members, or by such examiners as it may designate, prosecute any inquiry necessary to its duties in any part of the United States.

"Sec. 4. That the words defined in this section shall have the following meaning when found in this Act, to wit:

"'Commerce' means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.

"'Corporation' means any company or association incorporated or unincorporated, which is organized to carry on business for profit and has shares of capital or capital stock, and any company or association, incorporated or unincorporated, without shares or capital stock, except partnerships, which is organized to carry on business for its own profit or that of its members.

"'Documentary evidence' means all documents, papers, and correspondence in existence at and after the passage of this Act.

"'Acts to regulate commerce' means the Act entitled 'An Act to regulate commerce', approved February fourteenth, eighteen hundred and eighty-seven, and all Acts amendatory thereof and supplementary thereto.

"'Antitrust acts' means the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies', approved July second, eighteen hundred and ninety; also the sections seventy-three to seventy-seven, inclusive, of an Act entitled 'An Act to reduce taxation to provide revenue for the Government, and for other purposes', approved August twenty-seventh, eighteen hundred and ninety-four; and also the Act entitled 'An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes"', approved February twelfth, nineteen hundred and thirteen.

"SEC. 5. [That] (a) Unfair methods of competition in commerce, *and unfair or deceptive acts or practices in commerce*, are hereby declared unlawful.

"The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, [and] common carriers subject to the Acts to regulate commerce, *and persons, partnerships, or corporations subject to the Packers and Stockyards Act, 1921, except as provided in said Act*, from using unfair methods of competition in commerce *and unfair or deceptive acts or practices in commerce*.

"(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair [methods] *method of competition or unfair or deceptive act or practice* in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect [.] and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission [.] to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition *or the act or practice* in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts [.] and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition *or such act or practice*. [Until a transcript of the record in such hearing shall have] *Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the transcript of the record in the proceeding has been filed in a circuit court of appeals of the United States*, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. *After the expira-*

tion of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, with the consent of the person, partnership, or corporation required by the order to cease and desist, modify, or set aside, in whole or in part, the report or order made or issued by it under this section.

“[If such person, partnership, or corporation fails or neglects to obey such order of the commission while the same is in effect, the commission may apply to the circuit court of appeals of the United States, within any circuit where the method of competition in question was used or where such person, partnership, or corporation resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, partnership, or corporation and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission.]

“(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the circuit court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith served upon the Commission, and thereupon the Commission forthwith shall certify and file in the court a transcript of the entire record in the proceeding, including all the evidence taken and the report and order of the Commission. Upon such filing of the petition and transcript the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, evidence, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed, and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by evidence [testimony], shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by [testimony] evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section [two hundred and forty] 240 of the Judicial Code.

“[Any party required by such order of the Commission to cease and desist from using such method of competition may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission be set aside. A copy of such petition shall be forthwith served upon the commission, and thereupon the commission forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission as in the case of an application by the commission for the enforcement of its order, and the findings of the commission as to the facts, if supported by testimony, shall in like manner be conclusive.]

“(d) The jurisdiction of the Circuit Court of Appeals of the United States to affirm, enforce, [set aside, or modify] modify, or set aside orders of the Commission shall be exclusive.

"(e) Such proceedings in the Circuit Court of Appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the Commission or judgment of [the] court to enforce the same shall in any wise relieve or absolve any person, partnership, or corporation from any liability under the antitrust Acts.

"(f) Complaints, orders, and other processes of the Commission under this section may be served by anyone duly authorized by the Commission, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the residence or the principal office or place of business of such person, partnership, or corporation; or (c) by registering and mailing a copy thereof addressed to such person, partnership, or corporation at his or its residence or principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post-office receipt for said complaint, order, or other process registered and mailed as aforesaid shall be proof of the service of the same.

"(g) An order of the Commission to cease and desist shall become final—

"(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the Commission may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b); or

"(2) Upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed or the petition for review dismissed by the Circuit Court of Appeals, and no petition for certiorari has been duly filed; or

"(3) Upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review dismissed by the Circuit Court of Appeals; or

"(4) Upon the expiration of thirty days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the order of the Commission be affirmed or the petition for review dismissed.

"(h) If the Supreme Court directs that the order of the Commission be modified or set aside, the order of the Commission rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of thirty days from the time it was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected to accord with the mandate, in which event the order of the Commission shall become final when so corrected.

"(i) If the order of the Commission is modified or set aside by the Circuit Court of Appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered in accordance with the mandate of the Circuit Court of Appeals shall become final on the expiration of thirty days from the time such order of the Commission was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the order of the Commission shall become final when so corrected.

"(j) If the Supreme Court orders a rehearing; or if the case is remanded by the Circuit Court of Appeals to the Commission for a rehearing, and if (1) the time allowed for filing a petition for certiorari has expired, and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered upon such rehearing shall become final in the same manner as though no prior order of the Commission had been rendered.

"(k) As used in this section the term 'mandate', in case a mandate has been recalled prior to the expiration of thirty days from the date of issuance thereof, means the final mandate.

"(l) Any person, partnership, or corporation who violates an order of the Commission to cease and desist after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than \$5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

"SEC. 6. That the commission shall also have power—

"(a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of

any corporation engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, and its relation to other corporations and to individuals, associations, and partnerships.

"(b) To require, by general or special orders, corporations engaged in commerce, excepting banks, and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the commission may prescribe, and shall be filed with the commission within such reasonable period as the commission may prescribe, unless additional time be granted in any case by the commission.

"(c) Whenever a final decree has been entered against any defendant corporation in any suit brought by the United States to prevent and restrain any violation of the antitrust Acts, to make investigations, upon its own initiative, of the manner in which the decree has been or is being carried out, and upon the application of the Attorney General it shall be its duty to make such investigation. It shall transmit to the Attorney General a report embodying its findings and recommendations as a result of any such investigation, and the report shall be made public in the discretion of the commission.

"(d) Upon the direction of the President or either House of Congress to investigate and report the facts relating to any alleged violations of the antitrust Acts by any corporation.

"(e) Upon the application of the Attorney General, to investigate and make recommendations for the readjustment of the business of any corporation alleged to be violating the antitrust Acts, in order that the corporation may thereafter maintain its organization, management, and conduct of business in accordance with law.

"(f) To make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest; and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation; and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use.

"(g) From time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of this Act.

"(h) To investigate, from time to time, trade conditions in and with foreign countries where associations, combinations, or practices of manufacturers, merchants, or traders, or other conditions, may affect the foreign trade of the United States, and to report to Congress thereon, with such recommendations as it deems advisable.

"SEC. 7. That in any suit in equity brought by or under the direction of the Attorney General as provided in the antitrust Acts, the court may, upon the conclusion of the testimony therein, if it shall be then of opinion that the complainant is entitled to relief, refer said suit to the commission, as a master in chancery, to ascertain and report an appropriate form of decree therein. The commission shall proceed upon such notice to the parties and under such rules of procedure as the court may prescribe, and upon the coming in of such report such exceptions may be filed and such proceedings had in relation thereto as upon the report of a master in other equity causes, but the court may adopt or reject such report, in whole or in part, and enter such decree as the nature of the case may in its judgment require.

"SEC. 8. That the several departments and bureaus of the Government when directed by the President shall furnish the commission, upon its request, all records, papers, and information in their possession relating to any corporation subject to any of the provisions of this Act, and shall detail from time to time such officials and employees to the commission as he may direct.

"SEC. 9. That for the purposes of this Act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the produc-

tion of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpoenas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence.

"Such attendance of witnesses, and the production of such documentary evidence may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

"Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

"Upon the application of the Attorney General of the United States, at the request of the commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of this Act or any order of the commission made in pursuance thereof.

"The commission may order testimony to be taken by deposition in any proceeding or investigation pending under this Act at any stage of such proceeding or investigation. Such depositions may be taken before any person designated by the commission and having power to administer oaths. Such testimony shall be reduced to writing by the person taking the deposition, or under his direction, and shall then be subscribed by the deponent. Any person may be compelled to appear and depose and to produce documentary evidence in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the commission as hereinbefore provided.

"Witnesses summoned before the commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

"No person shall be excused from attending and testifying or from producing documentary evidence before the commission or in obedience to the subpoena of the commission on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before the commission in obedience to a subpoena issued by it: *Provided*, That no natural person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

"Sec. 10. That any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce documentary evidence, if in his power to do so, in obedience to the subpoena or lawful requirement of the commission, shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than \$1,000 nor more than \$5,000, or by imprisonment for not more than one year, or by both such fine and imprisonment.

"Any person who shall willfully make, or cause to be made, any false entry or statement of fact in any report required to be made under this Act, or who shall willfully make, or cause to be made, any false entry in any account, record, or memorandum kept by any corporation subject to this Act, or who shall willfully neglect or fail to make, or to cause to be made, full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the business of such corporation, or who shall willfully remove out of the jurisdiction of the United States, or willfully mutilate, alter, or by any other means falsify any documentary evidence of such corporation, or who shall willfully refuse to submit to the commission or to any of its authorized agents, for the purpose of inspection and taking copies, any documentary evidence of such corporation in his possession or within his control, shall be deemed guilty of an offense against the United States, and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than

\$1,000 nor more than \$5,000, or to imprisonment for a term of not more than three years, or to both such fine and imprisonment.

"If any corporation required by this Act to file any annual or special report shall fail so to do within the time fixed by the commission for filing the same, and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of \$100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where the corporation has its principal office or in any district in which it shall do business. It shall be the duty of the various district attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

"Any officer or employee of the commission who shall make public any information obtained by the commission without its authority, unless directed by a court, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by fine and imprisonment, in the discretion of the court.

"SEC. 11. Nothing contained in this Act shall be construed to prevent or interfere with the enforcement of the provisions of the antitrust Acts or the Acts to regulate commerce, nor shall anything contained in the Act be construed to alter, modify, or repeal the said antitrust Acts or the Acts to regulate commerce or any part or parts thereof.

"Sec. 12. (a) *It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement—*

(1) *By United States mails, or in commerce by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of food, drugs, devices, or cosmetics; or*

(2) *By any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in commerce of food, drugs, devices, or cosmetics.*

(b) *The dissemination or the causing to be disseminated of any false advertisement within the provisions of subsection (a) of this section shall be an unfair or deceptive act or practice in commerce within the meaning of section 5.*

"Sec. 13. (a) *Whenever the Commission has reason to believe—*

(1) *that any person, partnership, or corporation is engaged in, or is about to engage in, the dissemination or the causing of the dissemination of any advertisement in violation of section 12, and*

(2) *that the enjoining thereof pending the issuance of a complaint by the Commission under section 5, and until such complaint is dismissed by the Commission or set aside by the court on review, or the order of the Commission to cease and desist made thereon has become final within the meaning of section 5, would be to the interest of the public,*

"the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States or in the United States court of any Territory, to enjoin the dissemination or the causing of the dissemination of such advertisement. Upon proper showing a temporary injunction or restraining order shall be granted without bond. Any such suit shall be brought in the district in which such person, partnership, or corporation resides or transacts business.

"(b) Whenever it appears to the satisfaction of the court in the case of a newspaper, magazine, periodical, or other publication, published at regular intervals—

(1) *that restraining the dissemination of a false advertisement in any particular issue of such publication would delay the delivery of such issue after the regular time therefor, and*

(2) *that such delay would be due to the method by which the manufacture and distribution of such publication is customarily conducted by the publisher in accordance with sound business practice, and not to any method or device adopted for the evasion of this section or to prevent or delay the issuance of an injunction or restraining order with respect to such false advertisement or any other advertisement.*

"the court shall exclude such issue from the operation of the restraining order or injunction.

"Sec. 14 (a) Any person, partnership, or corporation who violates any provision of section 12 shall, if the use of the commodity advertised may be injurious to health because of results from such use, or if such violation is with intent to defraud or mislead, be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not more than \$5,000 or by imprisonment for not more than six months, or by both such fine and imprisonment; except that if the conviction is for a violation committed after a first conviction of such person, partnership, or corporation, for any violation of such section, punishment shall be by a fine of not more than 110,000 or by imprisonment for not more than one year, or by both such fine and imprisonment.

"(b) No publisher, radio-broadcast licensee, or agency or medium for the dissemination of advertising, except the manufacturer, packer, distributor, or seller of the commodity to which the false advertisement relates, shall be liable under this section by reason of the dissemination by him of any false advertisement, unless he has refused, on the request of the Commission, to furnish the Commission the name and post-office address of the manufacturer, packer, distributor, seller, or advertising agency, residing in the United States, who caused him to disseminate such advertisement. No advertising agency shall be liable under this section by reason of the causing by it of the dissemination of any false advertisement, unless it has refused, on the request of the Commission, to furnish the Commission the name and post-office address of the manufacturer, packer, distributor, or seller, residing in the United States, who caused it to cause the dissemination of such advertisement.

"Sec. 15. For the purposes of sections 12, 13, and 14—

"(a) The term 'false advertisement' means an advertisement, other than labeling, which is misleading in a material respect, and in determining whether any advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates; but if, at the time of the dissemination of the advertisement, there exists a substantial difference of opinion, among experts qualified by scientific training and experience, as to the truth of a representation, the advertisement shall not be considered misleading on account of such representation, if it states clearly and prominently the fact of such difference of opinion. Nothing in this paragraph shall be construed as requiring the making of such statement as to difference of opinion, and failure to so state the fact of such difference of opinion shall not relieve the Government of the burden of establishing the misleading character of the representation. No advertisement of a drug shall be deemed to be false if it is disseminated only to members of the medical profession, contains no false representation of a material fact, and includes, or is accompanied in each instance by truthful disclosure of, the formula showing quantitatively each ingredient of such drug.

"(b) The term 'food' means (1) articles used for food or drink for man or other animals, (2) chewing gum, and (3) articles used for components of any such article.

"(c) The term 'drug' means (1) articles recognized in the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them; and (2) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; and (3) articles (other than food) intended to affect the structure or any function of the body of man or other animals; and (4) articles intended for use as a component of any article specified in clause (1), (2), or (3); but does not include devices or their components, parts or accessories.

"(d) The term 'device' (except when used in subsection (a) of this section) means instruments, apparatus, and contrivances, including their parts and accessories, intended (1) for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; or (2) to affect the structure or any function of the body of man or other animals.

"(e) The term 'cosmetic' means (1) articles intended to be rubbed, poured, sprinkled, or sprayed on, introduced into, or otherwise applied to the human body or any part thereof for cleansing, beautifying, promoting attractiveness, or altering the appearance, and (2) articles intended for use as a compound of any such article; except that such term shall not include soap.

"Sec. 16. Whenever the Federal Trade Commission has reason to believe that any person, partnership, or corporation is liable to a penalty under section 14 or under subsection (c) of section 5, it shall certify the facts to the Attorney General, whose duty it shall be to cause appropriate proceedings to be brought for the enforcement of the provisions of such section or subsection.

"Sec. 17. If any provision of this Act, or the application thereof to any person, partnership, corporation, or circumstance, is held invalid, the remainder of the Act and the application of such provision to any other person, partnership, corporation, or circumstance, shall not be affected thereby.

"Sec. 18. This Act may be cited as the 'Federal Trade Commission Act'."

ADDITIONAL VIEWS

The undersigned members of the committee are heartily in favor of the general purposes of the bill herewith reported but feel that the proposed new provisions of the Federal Trade Commission Act intended to regulate misleading advertising of food, drugs, devices, and cosmetics fall far short of giving to the consuming public that protection which they are represented as giving and to which the public is fairly entitled.

NEED FOR CONTROL

There has been an increasing demand for effective legislation against false advertising of food, drugs, and cosmetics. This demand arises not only from the public but also from honest manufacturers and advertisers of these products. It is universally recognized that the advertising of these commodities, the intelligent purchase and use of which are so essential to public health and welfare, must be safeguarded from the abuses—at times all too flagrant—of a small minority.

BILL IS INADEQUATE

The proposed new provisions profess to regulate the dissemination of misleading advertisements of food, drugs, devices, and cosmetics, but the methods by which this is to be accomplished are so weak and ineffective that the making of this gesture, having the appearance of providing for such regulation, may have consequences more harmful than desirable. The Federal Government will have put itself in a position where it will be responsible for the regulation of false advertisements in this field without having set up a means of regulation which will secure effective control.

The reason for this is that the bill, after prohibiting the dissemination of false advertisements of food, drugs, devices, and cosmetics, provides penalties only in a very limited class of cases, and relies in the great bulk of cases upon the cease-and-desist-order machinery of the Federal Trade Commission. The bill can be made an effective consumer-protection measure by the adoption of the following amendment, providing adequate penalties for violations, which will be offered when the bill comes before the House. This amendment was offered in the committee and received much favorable consideration, but was finally defeated. It is believed that upon careful consideration members interested in protecting consumers against the small group of unscrupulous advertisers which this bill seeks to regulate will vote for this amendment. The amendment is a proposed substitute for section 14 (a) and reads as follows:

"Sec. 14. (a) Any person, partnership, or corporation who violates any provision of section 12 shall forfeit and pay to the United States a civil penalty of not more than \$3,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States; but if the use of the commodity advertised may be injurious to health, the civil penalty shall be an amount not more than \$5,000.

"(b) If the violation is committed after judgment for a civil penalty under subsection (a) of this section has become final then such person, partnership, or corporation shall be guilty of a misdemeanor. Upon conviction punishment shall be by a fine of not more than \$5,000 or by imprisonment for not more than 1 year, or by both such fine and imprisonment; but if such conviction is in a case where the use of the commodity advertised may be injurious to health, punishment shall be by a fine of not more than \$10,000 or by imprisonment for not more than 2 years, or by both such fine and imprisonment."

FAILS TO MEET PRESIDENT'S VIEW

President Roosevelt, in his message of March 22, 1935, regarding the necessity for food and drug legislation, made the following statement as to the need for advertising control, after having outlined the need for revision in the present food and drug law:

"It is time to make practical improvements. A measure is needed which will extend the controls formerly applicable only to labels to advertising also; * * *."

From this it is perfectly clear that the President had in mind the need for enforcement of prohibitions against false advertisements of food, drugs, devices, and cosmetics by appropriate penalties of a character comparable to those which have been in the Food and Drug Act for 30 years. Under that act enforcement has not been only by the seizure of falsely labeled articles but also by criminal penalties.

It was urged in the committee, and it is now strongly urged, that once the dissemination of false advertisements has been prohibited the only effective means of enforcement is to provide appropriate penalties. Unless the disseminator of a false advertisement knows at the time of the dissemination that he may at some time in the future be held accountable by a criminal or civil penalty action for the unlawful dissemination, he will not be deterred from such dissemination. It is just this deterring effect that is lacking when dependence is placed upon the cease-and-desist order for enforcement.

WEAKNESS OF CEASE-AND-DESIST ORDER

The cease-and-desist-order machinery will not be effective to protect the public against false and misleading advertisements of these articles. This was demonstrated by exhibits before the committee consisting of cease-and-desist orders against certain false advertising, and advertisements subsequently appearing over a period of years conveying essentially the same false representations prohibited by the orders. The Federal Trade Commission, acting under its authority to prevent unfair methods of competition, has been active against false advertising of food, drugs, devices, and cosmetics for a number of years. The frequency with which false advertisements have been disseminated for the same products previously covered by cease-and-desist orders, particularly in many of the lower-grade magazines and in the programs of certain radio stations, would seem to demonstrate the ineffectiveness of the cease-and-desist-order machinery in the case of false advertising. This is in no way a criticism of the Federal Trade Commission or its personnel, or of its diligence in enforcing the law under which it operates. No governmental agency has executed its functions more efficiently or more courageously. But it is a recognition of the fact that the method of procedure under which the Commission operates is subject to limitations which make it ill adapted to coping with false advertising as it is conducted today.

An impartial appraisal of the effectiveness of the cease-and-desist order as contrasted with enforcement by appropriate penalties is contained in an authoritative work entitled "The Federal Trade Commission," by Gerard C. Henderson (1924). This book was published under the sponsorship of the Commonwealth fund, under the supervision of a legal research committee composed of some of the foremost legal authorities of the country, including Mr. Justice Cardozo and Mr. Justice Stone, now members of the Supreme Court of the United States. In Mr. Henderson's book the following statement appears:

"Looking at the matter from a more critical viewpoint, however, it becomes apparent that there are certain limitations in the powers of the Commission and certain obstacles in its procedure which impair its usefulness in some of the cases involved.

* * * * *

"The second limitation which suggests itself, is that the Commission should not, except in special cases, institute proceedings where the practice in question falls within the scope of the Pure Food and Drugs Act, or of similar Federal legislation. The reason is that in such cases the law confers on the Department of agriculture powers in many ways more effective than those of the Federal Trade Commission, and that the Department has a scientific personnel more competent to deal with the technical questions involved. The Food and Drugs Act of June 30, 1906, makes it unlawful to manufacture in any Territory or in the District of Columbia, or to ship in interstate or foreign commerce, any article

of food or any drug which is 'adulterated or misbranded.' The words 'adulterated' and 'misbranded' are comprehensively defined, and it is obvious that the definitions are framed with an eye to practical administration as well as scientific accuracy. They cover every conceivable case of misrepresentation as to the ingredients, strength, quality, or purity of a drug or food product, or (by an amendment added in 1912) as to its curative or therapeutic effect; and all cases of misbranding, including imitation of the distinctive name of another article, misstatement as to weight, measure, or numerical count, and misrepresentation as to the State, Territory, or county in which the article is produced. In its enforcement the act has great advantages over the cumbersome procedure of the Federal Trade Commission. One who violates the act may be criminally prosecuted, whereas the Federal Trade Commission can only order him to cease and desist, without even forfeiting the unlawful gains derived from the violation. An adulterated or misbranded article, if transported in violation of the law, may be libeled and forfeited in proper proceedings, whereas there is nothing in the Federal Trade Commission Act to prevent a dealer who has been ordered to cease from shipping certain misbranded articles in interstate commerce, from selling them to another dealer in the same State. The latter can ship them with immunity, so far as the Federal Trade Commission Act is concerned, until the Commission's procedure has again set in motion and a new order issued and confirmed by the Court. As a police measure the Food and Drugs Act is therefore vastly superior to the Trade Commission law."

It is not difficult to foresee how impossible it will be to effectively control false advertising of food, drugs, devices, and cosmetics through the cease and desist order machinery. A manufacturer, let us assume, puts an advertisement in a number of magazines and newspapers and broadcasts the advertisements over the radio. By this means the advertisement is quickly brought to the attention of millions of persons all over the country.

The first move of the Federal Trade Commission would be to decide that it has reason to believe that the advertisement is false or misleading, and normally it only would be able to come to this conclusion after getting evidence and expert advice with regard to the matter from the technicians of the Food and Drugs Administration, unless a duplicate technical staff is to be established.

Having come to its conclusions, the Commission would serve upon the manufacturer a complaint and fix a date for a hearing which must be at least 30 days after the service of the complaint. At the proceeding the testimony would be reduced to writing and filed in the office of the Commission, and if the Commission found that the advertisement was false, it would have to make a report in writing in which it stated its findings as to the facts and would cause to be served upon the manufacturer an order requiring him to cease and desist from the dissemination of the false advertisement.

Only after the order had become final, probably after long delay in the courts, would it be necessary for the person complained against to stop disseminating the advertisement. During the time all of this procedure is being complied with, which in the ordinary course would involve the lapse of many months and sometimes many years, the manufacturer would be able to disseminate the particular advertisement freely and for a much longer period than he desired. Everyone is aware of the frequency with which advertisements are changed in modern times. Ordinarily they change from week to week.

Even after the order became effective, the false information or claims contained in the advertisement would still repose in the minds of the millions of persons who had read or listened to or been told about the claims made in the advertisement. And the manufacturer will have reaped the benefits of the false advertisement without the slightest fear of a penalty of any kind.

And after the order becomes effective the advertiser can change his advertising claims, or change the composition of the article, and repeat the process all over again. Therefore, in the absence of a possible penalty to act as a deterrent, the racketeering fringe, which has created the necessity for effective advertising control, is in nowise hampered in its depredations on public health and the consumer's pocketbook.

INJUNCTION WILL NOT PROTECT PUBLIC

The bill provides that the Commission may, whenever it has reason to believe that any person is disseminating or about to disseminate a false advertisement, seek an injunction against the dissemination pending the action of the Commission on a cease-and-desist order, but this provision has been limited by pro-

viding that the Commission is to ask for such injunction only if it believes that the issuance of such injunction "would be to the interest of the public." When it is borne in mind that an advertisement is not, under the definition in the bill, a false advertisement unless it is misleading in a material respect, there seems no justification for giving the Commission the authority to decide, according to how it happens to feel about the effect on the public, that it will not seek to have the dissemination of such advertisement enjoined. Under such circumstances the bill should have made it the duty of the Commission in every such case to seek an injunction.

Furthermore, even if the Commission decides that the public interest will be served by seeking an injunction, it can only do so after it has made substantially the same determinations, with the incident delays, that it would have to make before deciding to issue a cease-and-desist order. This involves, as in case of proceedings looking toward a cease-and-desist order, the necessity for seeking the experienced counsel of the Food and Drug Administration unless, as has been previously suggested, it is intended to set up in the Federal Trade Commission a duplicate technical staff.

It will thus be seen that the injunction, in this situation, is a slow and uncertain method of enforcement.

NARROW APPLICATION OF PENALTIES

From the foregoing it is obvious that the only effective means of preventing false advertisements is to enact provisions under which the unscrupulous would be deterred from violation by a knowledge that risk of penalty is involved for each offense.

But the bill provides a penalty for the dissemination of a false advertisement only where the "use of the commodity advertised may be injurious to health because of results from such use, or if the violation is with intent to defraud or mislead." While this provision on its face may appear to be a strong enforcement provision, it is of very limited application and will not cover the great bulk of misleading food, drug, device, and cosmetic advertisements. The cases of injury to health resulting from the medicine itself are unusual. They are in the comparatively rare cases of patent-medicine advertising where the product contains dangerously potent drugs. While there are occasional cases of this kind, the great bulk of patent-medicine advertising is in the case of products that are innocuous, like the tuberculosis cure which was a simple liniment, or the diabetes cure which was a brew of horsetail weed. These are the commodities responsible for most of the damage to health resulting from false advertising. Persons relying upon the unconscionable claims made in such false advertising unknowingly permit the disease to progress unchecked instead of seeking rational treatment by physicians. There have been many cases where persons who could have been cured by proper treatment have sunk to such a low condition while relying upon such worthless concoctions that their cases have become hopeless. Nevertheless, under this bill the penalty will not apply to such advertisements.

It is also going to be of little help to consumers to have the criminal penalty apply in cases where the violation is with intent to defraud or mislead. The effect of a false advertisement on the consumer is the same whether the intent of the advertiser is good or bad. The difficulty of proof of wrongful intent and the inadequacy of control where such proof is required have been demonstrated through 25 years of enforcement of the amendment to the Food and Drugs Act applicable to patent medicines. This provision (the repeal of which was approved by both Houses of Congress during the last session in the bill that failed in conference) requires the Government to prove that curative claims on labels are both false and fraudulent, thus making it necessary to prove wrongful intent. Efforts to enforce this provision have too frequently been futile and have always been inordinately expensive because of the long-drawn-out investigations necessary to acquire proof of what was in the manufacturer's mind. If for no other reason than that of expense alone, proceedings under the law here proposed will, it is predicted, ordinarily be by the ineffective cease-and-desist-order method.

One reason advanced in committee for providing penalties only in the limited classes of cases indicated above was that the definition of "false advertisement" is so broad and sweeping that the result would be that advertisers would find themselves in the position of incurring penalties even though they were innocent

of any wrongful intent and had no knowledge of having violated the law. This view seems hardly to be in accord with the realities of the situation. Certainly advertisers should know enough about the representations and claims they make to know whether they are justified by the facts. Surely this is not an unreasonable requirement to impose upon the small minority in the food, drug, device, and cosmetic field whose unscrupulous methods of advertising make this legislation necessary. The great majority of advertisers in these industries have nothing to fear from the requirements of this legislation, because the standard of conduct it sets up is no higher than that they have already set up for themselves. The definition is no broader than is necessary for public protection.

VIRGIL CHAPMAN.
EDWARD A. KENNEY.
CARL E. MAPES.

[Conference Report]

HOUSE OF REPRESENTATIVES

[H. Rept. No. 1774, 75th Cong., 3d sess.]

AMENDMENTS TO FEDERAL TRADE COMMISSION ACT

The committee of conference on the disagreeing votes of the two Houses on the amendment of the House to the bill (S. 1077) to amend the act creating the Federal Trade Commission, to define its powers and duties, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its disagreement to the amendment of the House and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the amendment of the House, insert the following:

That section 1 of the Act entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914, as amended (U. S. C., 1934 ed., title 15, sec. 41), is hereby amended by inserting before the period at the end of the third sentence thereof a colon and the following: "Provided, however, That upon the expiration of his term of office a Commissioner shall continue to serve until his successor shall have been appointed and shall have qualified."

Sec. 2. Section 4 of such Act, as amended (U. S. C. 1934 ed., title 15, sec. 44), is hereby amended to read as follows:

"Sec. 4. The words defined in this section shall have the following meaning when found in this Act, to wit:

"Commerce means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.

"Corporation' shall be deemed to include any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members, and has shares of capital or capital stock or certificates of interest, and any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, without shares of capital or capital stock or certificates of interest, except partnerships, which is organized to carry on business for its own profit or that of its members.

"Documentary evidence' includes all documents, papers, correspondence, books of account, and financial and corporate records.

"Acts to regulate commerce' means the Act entitled 'An Act to regulate commerce', approved February 14, 1887, and all Acts amendatory thereof and supplementary thereto and the Communications Act of 1934 and all Acts amendatory thereof and supplementary thereto.

"Antitrust Acts' means the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies', approved July 2, 1890; also sections 73 to 77, inclusive, of an Act entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes', approved August 27, 1894; also the Act entitled 'An Act to amend sections 73 and 76 of the Act of

August 27, 1894, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes", approved February 12, 1913; and also the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes', approved October 15, 1914."

Sec. 3. Section 5 of such Act, as amended (U. S. C., 1934 ed., title 15, sec. 45), is hereby amended to read as follows:

"Sec. 5. (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

"The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, and persons, partnerships, or corporations subject to the Packers and Stockyards Act, 1921, except as provided in section 406(b) of said Act, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

"(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the transcript of the record in the proceeding has been filed in a circuit court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require: Provided, however, That the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate circuit court of appeals of the United States, in the manner provided in subsection (c) of this section.

"(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the circuit court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith served upon the Commission, and thereupon the Commission forthwith shall certify and file in the court a transcript of the entire record in the proceeding, including all the evidence taken and the report and order of the Commission. Upon such filing of the petition and transcript the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, evidence, and proceedings set forth in such transcript a de-

cease affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed, and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors *pendente lite*. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 240 of the Judicial Code.

"(d) The jurisdiction of the circuit court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive.

"(e) Such proceedings in the circuit court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the Commission or judgment of court to enforce the same shall in anywise relieve or absolve any person, partnership, or corporation from any liability under the Antitrust Acts.

"(f) Complaints, orders, and other processes of the Commission under this section may be served by anyone duly authorized by the Commission, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the residence or the principal office or place of business of such person, partnership, or corporation; or (c) by registering and mailing a copy thereof addressed to such person, partnership, or corporation at his or its residence or principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post office receipt for said complaint, order, or other process registered and mailed as aforesaid shall be proof of the service of the same.

"(g) An order of the Commission to cease and desist shall become final—

"(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the Commission may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b); or

"(2) Upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed or the petition for review dismissed by the circuit court of appeals, and no petition for certiorari has been duly filed; or

"(3) Upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review dismissed by the circuit court of appeals; or

"(4) Upon the expiration of thirty days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the order of the Commission be affirmed or the petition for review dismissed.

"(h) If the Supreme Court directs that the order of the Commission be modified or set aside, the order of the Commission rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of thirty days from the time it was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected to accord with the mandate, in which event the order of the Commission shall become final when so corrected.

"(i) If the order of the Commission is modified or set aside by the circuit court of appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered in accordance with the mandate

of the circuit court of appeals shall become final on the expiration of thirty days from the time such order of the Commission was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the order of the Commission shall become final when so corrected.

"(j) If the Supreme Court orders a rehearing; or if the case is remanded by the circuit court of appeals to the Commission for a rehearing, and if (1) the time allowed for filing a petition for certiorari has expired, and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered upon such rehearing shall become final in the same manner as though no prior order of the Commission had been rendered.

"(k) As used in this section the term 'mandate,' in case a mandate has been recalled prior to the expiration of thirty days from the date of issuance thereof, means the final mandate.

"(l) Any person, partnership, or corporation who violates an order of the Commission to cease and desist after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than \$5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States."

Sec. 4. Such Act is further amended by adding at the end thereof new sections to read as follows:

"Sec. 12. (a) It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement—

"(1) By United States mails, or in commerce by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of foods, drugs, devices, or cosmetics; or

"(2) By any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in commerce of food, drugs, devices, or cosmetics.

"(b) The dissemination or the causing to be disseminated of any false advertisement within the provisions of subsection (a) of this section shall be an unfair or deceptive act or practice in commerce within the meaning of section 5.

"Sec. 13. (a) Whenever the Commission has reason to believe—

"(1) that any person, partnership, or corporation is engaged in, or is about to engage in, the dissemination or the causing of the dissemination of any advertisement in violation of section 12, and

"(2) that the enjoining thereof pending the issuance of a complaint by the Commission under section 5, and until such complaint is dismissed by the Commission or set aside by the court on review, or the order of the Commission to cease and desist made thereon has become final within the meaning of section 5, would be to the interest of the public.

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States or in the United States court of any Territory, to enjoin the dissemination or the causing of the dissemination of such advertisement. Upon proper showing a temporary injunction or restraining order shall be granted without bond. Any such suit shall be brought in the district in which such person, partnership, or corporation resides or transacts business.

"(b) Whenever it appears to the satisfaction of the court in the case of a newspaper, magazine, periodical, or other publication, published at regular intervals—

"(1) that restraining the dissemination of a false advertisement in any particular issue of such publication would delay the delivery of such issue after the regular time therefor, and

"(2) that such delay would be due to the method by which the manufacture and distribution of such publication is customarily conducted by the publisher in accordance with sound business practice, and not to any method or device adopted for the evasion of this section or to prevent or delay the issuance of an injunction or restraining order with respect to such false advertisement or any other advertisement,

the court shall exclude such issue from the operation of the restraining order or injunction.

"Sec. 14. (a) Any person, partnership, or corporation who violates any provision of section 12 (a) shall, if the use of the commodity advertised may be injurious to health because of results from such use under the conditions prescribed in the advertisement thereof, or under such conditions as are customary or usual, or if such violation is with intent to defraud or mislead, be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not more than \$5,000 or by imprisonment for not more than six months, or by both such fine and imprisonment; except that if the conviction is for a violation committed after a first conviction of such person, partnership, or corporation, for any violation of such section, punishment shall be by a fine of not more than \$10,000 or by imprisonment for not more than one year, or by both such fine and imprisonment: Provided, That for the purposes of this section meats and meat food products duly inspected, marked, and labeled in accordance with rules and regulations issued under the Meat Inspection Act approved March 4, 1907, as amended, shall be conclusively presumed not injurious to health at the time the same leave official establishments."

"(b) No publisher, radio-broadcast licensee, or agency or medium for the dissemination of advertising, except the manufacturer, packer, distributor, or seller of the commodity to which the false advertisement relates, shall be liable under this section by reason of the dissemination by him of any false advertisement, unless he has refused, on the request of the Commission, to furnish the Commission the name and post-office address of the manufacturer, packer, distributor, seller, or advertising agency, residing in the United States, who caused him to disseminate such advertisement. No advertising agency shall be liable under this section by reason of the causing by it of the dissemination of any false advertisement, unless it has refused, on the request of the Commission, to furnish the Commission the name and post-office address of the manufacturer, packer, distributor, or seller, residing in the United States, who caused it to cause the dissemination of such advertisement."

"Sec. 15. For the purposes of sections 12, 13, and 14—

"(a) The term 'false advertisement' means an advertisement, other than labeling, which is misleading in a material respect; and in determining whether any advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual. No advertisement of a drug shall be deemed to be false if it is disseminated only to members of the medical profession, contains no false representation of a material fact, and includes, or is accompanied in each instance by truthful disclosure of, the formula showing quantitatively each ingredient of such drug."

"(b) The term 'food' means (1) articles used for food or drink for man or other animals, (2) chewing gum, and (3) articles used for components of any such article."

"(c) The term 'drug' means (1) articles recognized in the official United States Pharmacopoeia, official Homoeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them; and (2) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; and (3) articles (other than food) intended to affect the structure or any function of the body of man or other animals; and (4) articles intended for use as a component of any article specified in clause (1), (2), or (3); but does not include devices or their components, parts, or accessories."

"(d) The term 'device' (except when used in subsection (a) of this section) means instruments, apparatus, and contrivances, including their parts and accessories, intended (1) for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; or (2) to affect the structure or any function of the body of man or other animals."

"(e) The term 'cosmetic' means (1) articles to be rubbed, poured, sprinkled, or sprayed on, introduced into, or otherwise applied to the human body or any part thereof intended for cleansing, beautifying, promoting attractiveness, or altering the appearance, and (2) articles intended for use as a component of any such article; except that such term shall not include soap."

"Sec. 16. Whenever the Federal Trade Commission has reason to believe that any person, partnership, or corporation is liable to a penalty under section 14 or

under subsection (1) of section 5, it shall certify the facts to the Attorney General, whose duty it shall be to cause appropriate proceedings to be brought for the enforcement of the provisions of such section or subsection.

"Sec. 17. If any provision of this Act, or the application thereof to any person, partnership, corporation, or circumstance, is held invalid, the remainder of the Act and the application of such provision to any other person, partnership, corporation, or circumstance, shall not be affected thereby.

"Sec. 18. This Act may be cited as the 'Federal Trade Commission Act.'"

Sec. 5. (a) In case of an order by the Federal Trade Commission to cease and desist, served on or before the date of the enactment of this Act, the sixty-day period referred to in section 5 (c) of the Federal Trade Commission Act, as amended by this Act, shall begin on the date of the enactment of this Act.

(b) Section 14 of the Federal Trade Commission Act, added to such Act by section 4 of this Act, shall take effect on the expiration of sixty days after the date of the enactment of this Act.

And the House agree to the same.

CLARENCE F. LEA,
VIRGIL CHAPMAN,
HERRON PEARSON,
CHAS. A. WOLVERTON,
CARROLL REECE,

Managers on the Part of the House.

BURTON K. WHEELER,
ROBERT F. WAGNER,
JAMES J. DAVIS,

Managers on the Part of the Senate.

STATEMENT OF THE MANAGERS ON THE PART OF THE HOUSE

The managers on the part of the House at the conference on the disagreeing votes of the Houses on the bill (S. 1077) to amend the act creating the Federal Trade Commission, to define its powers and duties, and for other purposes, submit the following statement in explanation of the effect of the action agreed upon by the conferees and recommended in the accompanying conference report:

The conference agreement retains all of the provisions of the House amendment with certain minor exceptions, which will be explained hereafter, and in addition has retained the provisions of sections 1, 5, and 6 of the Senate bill.

Section 1 of the Senate bill contained several amendments to section 4 of the present Federal Trade Commission Act. Said amendments dealt solely with definitions, including "commerce," "corporation," "documentary evidence," "acts to regulate commerce," and "antitrust acts." No comparable provisions were contained in the House amendment. The conference agreement retains these provisions of the Senate bill.

Section 5 of the Senate bill contained an amendment to section 1 of the present Federal Trade Commission Act providing—

"That upon the expiration of his term of office a Commissioner shall continue to serve until his successor shall have been appointed and shall have qualified."

No comparable provision was contained in the House amendment. The conference agreement retains this provision of the Senate bill.

Section 6 of the Senate bill contained the usual separability clause that if any part of the act or the application thereof to any person or circumstance be held invalid the remainder of the act and the application of such part to other persons or circumstances shall not be affected thereby. An identical provision was contained in the new section 17 of the Federal Trade Commission Act in section 2 of the House amendment. The conference agreement eliminates this provision in the Senate bill and retains it in the House amendment.

Section 2 of the Senate bill was the same in substance as section 1 of the House amendment with respect to declaring unlawful "unfair or deceptive acts or practices in commerce." Section 2 of the Senate bill also provided that cease and desist orders of the Commission should become final within 60 days after issuance against any person not seeking court review of such orders within that period. The House amendment to the same effect is more definite and certain and is similar to that found in the Revenue Act of 1926, fixing the time when orders of the Board of Tax Appeals become final. Section 2 of the Senate bill also provided a civil penalty of \$500 for each failure to obey the Commission's cease and desist order after the same became final and conclusive and while the

same was in effect, with a further penalty of \$25 for each day such violation continued. The House amendment provided a civil penalty of not more than \$5,000 for each such violation of the Commission's cease and desist orders. The conference agreement adopts section 1 of the House amendment.

Section 2 of the House amendment contained provisions dealing with the false advertisement of food, drugs, devices, and cosmetics. This section added new sections 12 to 18, inclusive, to the present Federal Trade Commission Act. There were no similar provisions in the Senate bill. Section 4 of the conference report retains the provisions of the House amendment, with certain modifications. The new section 14 (a), as added by the House amendment, provided penalties for the violation of the new section 12, if the use of the commodity advertised may be injurious to health because of results from such use. The conference agreement provides penalties for the violation of the new section 12 (a), instead of the new section 12. This is not a change in substance but to make the reference more accurate.

The conference agreement restricts the penalties under this section to those cases where the injury may result from the use of the commodity "under the conditions prescribed in the advertisement thereof or under such conditions as are customary or usual." These words clearly include cases where injury may result from the use of the commodity as recommended in the advertisement or where it is used under customary or usual conditions. The section does not contemplate penalization in those cases where the use is not as recommended and is not under usual or customary conditions. It is not intended to extend to cases where there might be injurious results merely because of reactions of consumers due to their peculiar idiosyncrasies or allergic conditions. A similar modifying provision containing the same subject matter is added by the conference agreement to the definition of false advertisement in the new section 15 (a), as approved by the House.

The new section 14 (a), in section 2 of the House amendment, exempted from its provisions products duly marked and labeled in accordance with rules and regulations issued under the Meat Inspection Act, as amended. The conference agreement eliminates such exempting language and substitutes in lieu thereof a provision that for the purposes of this section, meats and meat-food products duly inspected, marked, and labeled in accordance with rules and regulations issued under the Meat Inspection Act shall be conclusively presumed not injurious to health, at the time the same leave official establishments.

The new section 15 (a), in section 2 of the House amendment, relating to the definition of the term "false advertisement" contained a provision that if, at the time of the dissemination of an advertisement, there existed a substantial difference of opinion among experts as to the truth of a representation, the advertisement should not be considered misleading on account of such representation if it stated clearly and prominently the fact of such difference of opinion. There was no similar provision in the Senate bill. After consideration in conference the House conferees concluded that this language was unnecessary for the purposes of the legislation and the conference agreement eliminates this provision from the House amendment.

The new section 15 (e), in section 2 of the House amendment, defines the term "cosmetic" as meaning "(1) articles intended to be rubbed, poured, sprinkled, or sprayed on, introduced into, or otherwise applied to the human body or any part thereof for cleansing, beautifying, promoting attractiveness, or altering the appearance." etc. The conference agreement strikes out the word "intended" after the word "articles" in this definition and inserts said word after the word "thereof."

CLARENCE F. LEA,
VIRGIL CHAPMAN,
HERRON PEARSON,
CHAS. A. WOLVERTON,
CARROLL REECE.

Managers on the Part of the House.

Mr. DAVIS. Mr. Chairman, while the young lady was on the stand, I do not remember her name, by the way, with reference to a question asked by Congressman Reece. I want to say that the Federal Trade Commission and its staff never wrote any of those statements or had anything to do with any of those statements that those ladies presented. It was all their own. They appeared voluntarily.

I do not suppose anybody connected with the Commission saw any of their statements until they appeared here and presented them.

Mr. Chairman, Congressman Reece, as I understand it, made a reference to the fact that proceedings before the Food and Drug Administration were speedier than they were before the Federal Trade Commission.

In the first instance, that is true because it is a summary proceeding. They can go and seize the product and destroy it unless the owner of the goods goes into court and fights them, and then it takes the same course that our cases or any other cases do if they get into court, but it is a summary action to begin with, in seizing products that are adulterated or dangerous to health and impure.

When the Wheeler-Lea Act was up, Mr. Reece made this statement on the floor of the House:

Criticism has been made that the Commission's procedure is slow.

Necessarily, that must be so if a respondent in a Commission proceeding is to have his day in court. It takes time to gather evidence, conduct hearings, weigh testimony, and study briefs. Then when the Commission acts, its order is subject to review by the courts. Necessarily, this all makes for delay. For this reason, some have advocated transfer of jurisdiction over advertising to a bureau of one of the Government's executive departments, because of the swifter procedure possible in such bureau. But this smacks too much of bureaucracy and dictatorship. It would lodge too much arbitrary power in a subordinate official of an executive agency. Under such procedure, a merchant or manufacturer might be called on the carpet, told that his advertising was misleading, and that he must stop it. This would amount to confiscation of property without due process of law. No matter if the courts, 6 months or a year later, found that the advertising was not false and that the product was not harmful, business in that commodity or in that article already would have been destroyed. The procedure which your committee has devised provides for due process of law, and at the same time, through the injunction process, makes it possible for the Commission to move with sufficient promptness to meet any emergency situation that may arise. Under this procedure, necessary and constitutional safeguards of property will be afforded. Before an injunction can issue, first the Commission, itself a quasi-judicial body of five members, must be convinced that an emergency exists, and it in turn must convince the court of proper jurisdiction of the existence of such emergency, and that issuance of an injunction is justified and necessary in the public interest.

Since the passage of the Wheeler-Lea Act, the Commission has sought this injunctive power in 38 cases, and it was granted by the courts in 37.

Mr. REECE. And now the statement which I made, I think, is sound and I am not taking that statement back.

And in recognition of the necessity for slowness of action in proceedings of the Federal Trade Commission, we undertook to place jurisdiction in the Food and Drug Administration, in the case of dangerous or harmful drugs, to move more directly and more swiftly in order to conserve the health of the public and thereby gave them control over labeling and the statements which, in the opinion of the Food and Drug Administration, should go on the statements to adequately warn the purchasers. And in the provision of H. R. 2390, to which you refer, the only thing that is undertaken to be done is to continue single authority in the Food and Drug Administration to handle dangerous drugs in the interest of the public and control the labeling and the cautionary words on the label, and the basis for doing that is the statement from which you quote there.

Mr. DAVIS. I would like to place in the record all of Mr. Reece's speech on that Wheeler-Lea Act which involves all of the questions here with one exception.

Mr. REECE. I feel very much flattered, and I want to heartily concur in having my speech put in the record.

Mr. DAVIS. That is a good speech.

Mr. REECE. It subjects me to no embarrassment, because I still stand on all I said in the speech.

And now I want to make good on what I said, in the speech, that we had avoided any conflict in authority between the Federal Trade Commission and the Food and Drug Administration.

Mr. DAVIS. I am afraid you will not make as good a speech the second time as you did before and that is why I want it in.

(The statement referred to is as follows:)

[From the Congressional Record (House), January 12, 1938, pp. 397-399]

Mr. MAPES. Mr. Chairman, I yield 10 minutes to the gentleman from Tennessee [Mr. Reece].

Mr. REECE of Tennessee. Mr. Chairman, the Lea bill, or S. 1077, as reported out by the House Interstate and Foreign Commerce Committee, proposes to amend the Federal Trade Commission Act in a number of important particulars.

The Federal Trade Commission Act, passed in 1914, the same year in which the Clayton Act became law, was intended, along with the Clayton Act, to supplement and complement the Sherman antitrust law. It has been on the statute books for more than 22 years, and during all that time never has been amended. In the light of more than 22 years of experience in administering the act, the Federal Trade Commission has recommended certain amendments which have been approved by the Interstate and Foreign Commerce Committee, along with others which the House committee itself has written into the pending bill. Briefly, the pending bill would amend and extend the Federal Trade Commission law so as to—

Protect the consuming public from unfair practices in commerce, as the present law protects honest businessmen from unlawful competitive practices by their rivals;

Provide for Commission cease-and-desist orders to become effective after 60 days from issuance, unless appealed to the courts, and provide penalties for their violation;

Write specifically into law the declaration that false or misleading advertising of food, drugs, devices, or cosmetics, commodities which directly affect life and health, shall be unlawful, and provide civil and in some cases criminal penalties for the dissemination of such advertising;

Add certain clarifying and procedural amendments to the present law, in the interest of clarity, expedition, and economy of administration.

Of the proposed changes in the present Federal Trade Commission Act at least one is fundamental. Section 5 of the present Federal Trade Commission Act declares "unfair methods of competition in commerce" to be unlawful. The pending bill would change section 5 so as to provide that "unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce" shall be unlawful. The new language is "and unfair or deceptive acts or practices in commerce." This amendment is in the public interest. It seeks to make the consumer of equal concern under the law with the man who is engaged in commerce.

So far as I know, there is no serious objection to this change. It has been adopted by the Senate and recommended by the House committee. Personally, I have never entertained any doubt that when Congress declared unfair methods of competition to be unlawful, it intended to protect the public as well as the man who is engaged in commerce. But the courts have construed the language "unfair methods of competition" as limiting the Commission's jurisdiction to those cases in which it is able to establish the existence of competition and show that the practices complained about have been harmful to competitors. In other

words, to make out a case that will meet the test of the courts, the Commission must show that the acts complained of are injurious to competitors engaged in the same field of business, no matter how seriously they may injure the purchasing or consuming public.

Thus it can happen that if a corporation has a monopoly in a given field, with no competition, it may not be subject to the jurisdiction of the Federal Trade Commission, no matter how deceptive or how misleading, or how grossly unfair to the public, and no matter how much the public may suffer from its practices. It can also happen that if all competitors in a given field engage in the same sort of evil practices, the Commission may be powerless to act, no matter how much injury may be done the public.

In fact, in a relatively recent case involving the alleged false and deceptive advertising of a drug, the Supreme Court held that although the methods complained of were unfair, and the proceeding appeared to be in the interest of the public, the Commission was without jurisdiction because it has not established the essential that the unfair methods in question were "methods of competition in commerce."

This amendment not only is necessary in the public interest, because it will enable the Commission to protect the public from unfair trade practices, but it will be in the interest of economy and efficiency, because it will enable the Commission to make out a case without going to the trouble of providing competition. In most of the cases an element of competition is involved, but under the present procedure it is necessary for the Federal Trade Commission to prove it.

Often where it is perfectly obvious that practices complained about are detrimental to the public the Commission must spend a great deal of time and money in proving competition. This ought not to be, and that condition will no longer prevail if this amendment is adopted. In brief, this amendment makes the consumer—that is, the public—of equal concern before the law with the merchant or manufacturer who may be injured by the unfair methods of a dishonest competitor, and it will save both time and money.

Subsections (g) and (k), inclusive, of section 5 of the pending bill, are for the purpose of making definite the time when a Commission order to cease and desist shall become final—that is, within 60 days after the issuance of the order—unless, in the meantime, it shall have been appealed to the circuit court of appeals of proper jurisdiction.

Subsection (1) of section 5 provides that any person, partnership, or corporation who fails to obey an order of the Commission to cease and desist after such order shall become final shall forfeit and pay into the Public Treasury a civil penalty of not more than \$5,000 for each violation, such penalty to be recovered by a civil action brought by the United States. This provision is believed to be necessary in order to enforce obedience to Commission orders after they shall have become final and is similar to provisions written into the Packers' and Stockyards' Act and the Securities and Exchange Act.

A further important amendment to the present Federal Trade Commission Act is found in section 12 of the pending bill and relates to the advertising of food, drugs, devices, and cosmetics—a subject about which there has been most interest and most discussion during the period of more than 2 years this matter has been before the Congress.

Section 12 of the bill now before the House writes into law in specific language the declaration that it shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement, either by United States mails or in commerce, by any means, for the purpose of inducing or which is likely to induce the purchase of food, drugs, devices, or cosmetics; or to disseminate or cause to be disseminated, by any means, any such advertisement for the purpose of inducing or which is likely to induce the purchase in commerce of such commodities.

This section provides that the dissemination of a false advertisement as defined in the pending bill shall be an unfair or deceptive act or practice in commerce within the meaning of section 5 of the Federal Trade Commission Act and shall be subject to the Commission's cease-and-desist procedure, in addition to the injunction and criminal procedures.

Under the broad authority of section 5 of the present Federal Trade Commission Act, that Commission has jurisdiction over false or misleading advertising. The courts have held that such advertising is an unfair method of competition, and over the period of its existence the Commission has handled thousands of

advertising cases, issuing a great many cease-and-desist orders. Many of them have been carried to the courts, where a large preponderance of the Commission's orders have been sustained and the Commission's jurisdiction upheld and made clear. Amendments to present law as proposed in the pending bill confirm and make explicit in definite language jurisdiction which the Commission already has, and which it long has exercised. But they go further in that they will make for more effective administration by speeding up the Commission's procedure and provide definite penalties for the dissemination of unlawful advertising.

Section 14 provides that any person, partnership, or corporation violating any provision of section 12 shall, if the advertising induces the use of the commodity advertised in such manner as to render it injurious to health, or if such advertising is disseminated with clear intent to defraud or mislead, be guilty of misdemeanor, and, upon conviction, shall be punished by a fine of not more than \$5,000 or by imprisonment for not more than 6 months, or by both such fine and imprisonment, and that upon a second or subsequent violation the court may impose a fine of not more than \$10,000 or imprisonment for not more than 1 year, or by both such fine and imprisonment.

I insist this provision for criminal prosecution is a more effective restraint upon an advertiser than a mere civil liability, as was suggested by the gentleman from New Jersey [Mr. KENNEY] in his remarks a few minutes ago.

It will thus be seen that distinction is made between the false advertising of commodities the use of which may be injurious to health, and those whose use does not affect health. There was some sentiment in the committee for the imposition of penalties for the dissemination of any false advertisement, whether or not the use of the commodity advertised affected health. The committee took the position—and I think it sound—that where a food, drug, device, or cosmetic would not endanger life or health it should not be set apart or treated differently from other commodities, alike not injurious. In other words, the committee felt that more rigorous penalties should be imposed for the false advertisement of a product that might endanger life or health than in cases where such risk is not involved, and that in order to stop dangerous advertising practices criminal procedure should be invoked, of course, under due process of law. Therefore, the pending bill proposes to discontinue the present cease-and-desist order procedure of the Federal Trade Commission with respect to the false advertising of all commodities which do not endanger health, whether food, drugs, or whatever the commodity, while in cases involving the advertising of products which may injure health the Commission would be required to certify the facts to the Department of Justice, where criminal procedure would be instituted, and the criminal penalties of the pending bill invoked in the courts, under due process of law.

If this does not provide teeth to enable the effective enforcement of the advertising provisions of the proposed legislation, I should like to see someone propose teeth which would be more effective. This certainly is a more effective provision than the mere imposition of civil penalties. We have drawn a distinction between advertising where injury to health is not involved and advertising where injury to health may be invoked, and provided drastic criminal penalties, in addition to a fine for false advertising where injury to health is involved or where there is intent to defraud. I regret some of the gentlemen appear to fail to understand this plan and effective provision of the bill now before the House.

There is a further provision in section 13 of the pending bill which gives the Federal Trade Commission to right to move in the interest of the public to prevent the dissemination of advertisements of food, drugs, devices, or cosmetics in violation of section 12. This is the right given the Commission to go before a court and sue for an injunction to prevent the dissemination of such advertisement pending the outcome of the Commission's regular cease-and-desist-order procedure. Paragraphs 1 and 2 of section 13 of the pending bill provide that where any person, partnership, or corporation is engaged in or is about to engage in the dissemination of an advertisement in violation of section 12, and that the enjoining thereof would be to the interest of the public, the Commission may bring suit in a district court to enjoin the dissemination of such advertisement pending the issuance of a complaint by the Commission under section 5, and until such complaint is dismissed by the Commission or set aside by the court, or the order of the Commission to cease and desist has become final. It is required that such suit shall be brought in the district in which such person, partnership, or corporation resides or transacts business.

Simply stated, the right of the Federal Trade Commission to sue for an injunction, as set out in section 13, means that where information reaches the

Commission that false advertisements are being disseminated, or are about to be disseminated, of a food, drug, device, or cosmetic in violation of section 12, the Commission may have the right to move swiftly to prevent the distribution of such advertisements. This amendment will meet the criticism that has been lodged against the Commission that under its present authority it cannot proceed swiftly to meet an emergency situation involving a menace to life or health. Criticism has been made that the Commission's procedure is slow.

Necessarily, that must be so if a respondent in a Commission proceeding is to have his day in court. It takes time to gather evidence, conduct hearings, weigh testimony, and study briefs. Then when the Commission acts, its order is subject to review by the courts. Necessarily this all makes for delay. For this reason some have advocated transfer of jurisdiction over advertising to a bureau of one of the Government's executive departments, because of the swifter procedure possible in such bureau. But this smacks too much of bureaucracy and dictatorship. It would lodge too much arbitrary power in a subordinate official of an executive agency. Under such procedure, a merchant or manufacturer might be called on the carpet, told that his advertising was misleading, and that he must stop it. This would amount to confiscation of property, without due process of law. No matter if the courts, 6 months or a year later, found that the advertising was not false and that the product was not harmful, business in that commodity or in that article already would have been destroyed. The procedure which your committee has devised provides for due process of law, and at the same time, through the injunction process, makes it possible for the Commission to move with sufficient promptness to meet any emergency situation that may arise. Under this procedure, necessary and constitutional safeguards of property will be afforded. Before an injunction can issue, first the Commission, itself a quasi judicial body of five members, must be convinced that an emergency exists, and it in turn must convince the court of proper jurisdiction of the existence of such emergency, and that issuance of an injunction is justified and necessary in the public interest.

I cannot understand how anyone could read carefully the provisions of the proposed legislation and reach any other conclusion than that it is a most drastic bill. As far as I am concerned, I yield to no one in my desire to provide an effective law dealing with food, drugs, devices, and cosmetics, and with advertising relating to such commodities. If I did not believe the provisions of the bill now before the House would enable the Federal Trade Commission to enforce effectively the advertising provision, I would be the first to oppose its enactment. The difference of opinion, as the gentleman from Michigan has stated, is as to the agency which is to enforce the provisions of the law. The Federal Trade Commission since its inception has been charged with the responsibility of enforcing the false-advertising provisions of the law. This bill simply strengthens the present law to enable the Commission to enforce the law effectively as it relates to food, drugs, devices, and cosmetics when injury to health is involved or where there is an intent to defraud the public.

From the beginning of the agitation to amend and modernize the Food and Drug Act, passed 30 years ago, a serious controversy has been over the question of where jurisdiction over advertising of food, drugs, devices, and cosmetics should be lodged. At present all jurisdiction over advertising is lodged in the Federal Trade Commission. By the late unlamented and so-called Tugwell bill and its successor, the Copeland bill, which the Senate passed in the last Congress, such jurisdiction would have been conferred upon the Food and Drug Administration of the Department of Agriculture. However, the Senate bill expressly said that none of the present powers of the Federal Trade Commission should be diminished. Thus enactment of the Copeland bill would have meant the setting up of jurisdiction over false and misleading advertising in the Food and Drug Administration under the Copeland bill and the continuation of such jurisdiction in the Federal Trade Commission under section 5 of its organic act.

The House Interstate and Foreign Commerce Committee gave this matter most thoughtful consideration and finally voted overwhelmingly against dual jurisdiction and in favor of continuation of exclusive advertising jurisdiction in the Federal Trade Commission, where jurisdiction over the advertising of all commodities, whether food, drugs, or what not, is and has been since the passage of that act in 1914. The House itself in the last Congress overwhelmingly approved its committee's action. However, that bill died in conference during the legislative log jam which attended the closing days of the session.

When this Congress met the matter again came up, and food and drug bills were again introduced. Also, the able gentleman from California (Mr. Lea), who had succeeded the present majority leader, Mr. Rayburn, as chairman of the Interstate and Foreign Commerce Committee, introduced a bill amending the Federal Trade Commission Act. Chairman Lea evolved the idea that instead of writing advertising provisions into the Food and Drug Act it would be more consistent with sound legislative policy to eliminate all reference to advertising in the food and drug bill and to so amend the Federal Trade Commission Act as to give to that Commission all necessary power to effectively prevent the dissemination of false and misleading advertising.

This plan of the gentleman from California met with the approval of his committee, and the committee reported out what is now known as the Lea bill, which is a substitute for the Senate bill sponsored by the senior Senator from Montana, Senator Wheeler, amending the Federal Trade Commission Act and containing sections dealing with the advertising problem. It is this bill that is before you.

As a member of the Interstate and Foreign Commerce Committee, I, with a number of my colleagues, have worked diligently and earnestly to write two bills which will accomplish necessary reform in food and drug control and do all that the Government may do to prevent the dissemination of false and misleading advertising. The bill amending the Federal Trade Commission Act and dealing specifically with advertising is before you for action. It is to be followed by a food-and-drug bill which I, as a member of the committee, believe will give the Food and Drug Administration of the Department of Agriculture ample authority with which to effectively regulate and control the food, drug, device, and cosmetic industries. If the House passes these two bills, I believe that agreements on such legislation can be effected with the other branch of Congress and we will have equipped two appropriate agencies of the Federal Government with all of the authority and power necessary to properly regulate the food, drug, device, and cosmetic industries, to prevent the dissemination of unlawful advertising, and protect the public.

No legislation that Congress enacts is ever acceptable to everybody. Some may say that the Lea bill is not sufficiently exacting, while others are likely to criticize it in that it goes too far and gives the Federal Trade Commission too much power. Personally, I am of the opinion that your committee, in striking a happy medium, has done an excellent job and that this is the best bill on the subject that ever has been offered in either branch of the Congress. It ought to pass, as I believe it will pass, and thus accomplish the solution of an important problem that has been before the Congress for many years.

(Mr. Reece of Tennessee asked and was given permission to revise and extend his own remarks in the Record.)

Mr. REECE. Do you plan to discuss, Judge, the question of the right of the court to modify an order of the Commission?

Mr. DAVIS. Mr. Kelley and Mr. Wooden discussed that at length and cited case after case. I do not think it is necessary to cover the same ground when there are many other things that have not been covered that I would like to cover.

Mr. REECE. Do you mean to say the court has full authority to modify an order, then to give whatever measure of relief, which, in the court's opinion, the facts in the case justify?

Mr. DAVIS. Those gentlemen discussed all of that and I do not care to enter into that discussion. It is off of what I am saying, and I just want an opportunity to cover this.

Mr. REECE. It might be helpful to have your expression on it.

Mr. DAVIS. I will discuss it at length with you when I have more time, but I do not have much time now as the committee wants to conclude the hearings today.

Mr. REECE. I think it is really information which has an important bearing upon one provision of the bill; that is, as to whether the Commission feels that the courts have authority to modify an order to give

the measure of relief which the courts feel the facts and circumstances might justify. I do see why it should be so difficult to state your views on this important question.

Mr. DAVIS. Mr. Kelley discussed that.

Mr. REECE. Mr. Kelley has already spoken.

Mr. KELLEY. Nobody can answer that question. Of course, the judiciary of the United States has the power with respect to questions of law, and anytime, as a matter of law, if that is what is involved, the court has full power to affirm or set aside or modify.

With respect to a conclusion that is factual and where the Commission issues an order based upon a factual matter, where they have concluded that there is deception and where the other side does not controvert it, that there is deception, so that the Commission and the court and the defendant all admit there is deception but that the defendant claims that the Commission, in applying the remedy, went too far, in that case that question is before the Supreme Court of the United States in the Alpacuna case.

I cannot tell whether the Court is going to hold that the Court has power in such a case. I cannot tell whether they are going to hold that it was a matter of discretion for the Commission as to whether the Commission did abuse its discretion or whether it did not abuse its discretion.

No one with any finality or with anything except guessing can answer that question until the Supreme Court of the United States decides that case.

And whether the Court is going to follow the Royal Milling case or the White Pine cases, I do not know. So we might just as well quit talking until the Supreme Court decides; that is, talking with any authority as to whether or not the Court has power with respect to a remedy applied to a factual matter that is not in dispute.

Mr. DAVIS. On the question of conflict that I started some time ago to get a chance to tell you about, after the enactment of the Wheeler-Lea Act, the Federal Trade Commission, in its own meetings, decided that it would not proceed where there was nothing involved except labeling.

A representative of the Food and Drug Administration asked the Commission, or asked the staff of the Commission, to proceed against the Fresh Grown Preserve Corp., which was selling impure and adulterated preserves under false labels and advertising. They had proceeded against them in a seizure proposition and had lost the case in court, and they said that if that stood, there would be absolutely no control for protecting the public against impure preserves, et cetera.

The Federal Trade Commission, after discussing it, instituted an action in that case. As a matter of fact, there was also a circular that was distributed, making the same representations, as well as the labels, but the case was tried and the Commission rendered a cease-and-desist order and it was affirmed by the circuit court of appeals.

And here are the decisions in that case which I would like to go in the record.

(The decisions referred to are as follows:)

Docket 3682

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 132—October Term, 1943

(Argued November 10, 1943. Decided December 6, 1943)

FRESH GROWN PRESERVE CORPORATION, A CORPORATION; SUN DISTRIBUTING COMPANY, INC., A CORPORATION; RITE PACKING CORPORATION, A CORPORATION; MURRAY GREENBERG, AN INDIVIDUAL, AND LEO GREENBERG, AN INDIVIDUAL, PETITIONERS, AGAINST FEDERAL TRADE COMMISSION, RESPONDENT

Before SWAN, AUGUSTUS N. HAND, and CHASE, *Circuit Judges*.

On motion to confirm supplemental findings and conclusions of the Federal Trade Commission and for a decree enforcing a cease-and-desist order.

LOUIS HALLE, Attorney for Petitioners.

W. T. KELLEY, Chief Counsel, Federal Trade Commission;

EARL J. KOLB, Special Attorney; Attorneys for Respondent.

Per Curiam:

The petition to review and set aside the order made by the Federal Trade Commission against these petitioners has already been heard and decided insofar as was possible on the original record. See *Fresh Grown Preserve Corp. v. Federal Trade Commission*, 125 F. (2) 917. All but one of the issues were then decided adversely to the petitioners.

We then held that they had been so limited in their effort to show that there was no known and established standard for the manufacture of fruit preserves that they had not been given a fair hearing and remanded the cause to the commission that the petitioners might have an ample opportunity to present their evidence on that subject. The commission has now accorded them the opportunity to introduce such evidence as they cared to offer upon that issue and, having duly considered this additional evidence in connection with all the other evidence brought out in the proceedings, has made supplemental findings which show that the standard did actually exist as previously found.

The matter is now before us on the motion of the commission for the dismissal of the petition to review and for the confirmation and enforcement of its original cease-and-desist order and, as the record is now complete, we can decide the sole issue before left at large by determining whether there was sufficient evidential support for the findings in view of all the proof on that subject.

It is apparent that there was and that the commission has made no error in its findings of fact. They undoubtedly support the cease-and-desist order. That being so, it follows from our former decision which disposed of all the other matters the petitioners have undertaken to argue anew that the present motion of the commission should be granted.

Petition for review dismissed. Let a decree for the confirmation and enforcement of the cease-and-desist order be entered.

Docket 3682

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 51—October Term, 1941

(Argued November 13, 1941 Decided February 16, 1942)

FRESH GROWN PRESERVE CORPORATION, A CORPORATION; SUN DISTRIBUTING COMPANY, INC., A CORPORATION; MURRAY GREENBERG, AN INDIVIDUAL; AND LEO GREENBERG, AN INDIVIDUAL, PETITIONERS, *against* FEDERAL TRADE COMMISSION, RESPONDENT

PETITION TO SET ASIDE A CEASE-AND-DESIST ORDER OF THE FEDERAL TRADE COMMISSION

Remanded to the Commission for further hearing.

Before: SWAN, AUGUSTUS N. HAND, and CHASE, *Circuit Judges*.

W. T. KELLEY, Chief Counsel, Federal Trade Commission; Martin A. Morrison, Assistant Chief Counsel, James W. Nichol and Earl J. Kolb, Special Attorneys, for Respondent.

LOUIS HALLE, Attorney for Petitioners; Edward Halle, on the Brief.

CHASE, *Circuit Judge*: This petition, under 15 U. S. C. A. § 45 (c), puts in issue for purposes of review an order made by the Federal Trade Commission requiring

the petitioners to cease and desist from labelling, marking, or advertising their products as "preserves," or "pure preserves" unless they contain a fruit content in proportion to sugar of at least 45 to 55 by weight; from representing that their products, not having such proportions, are "preserves" or "pure preserves"; and from representing that their products are composed of named fruits when in fact they contain a mixture of fruits other than those stated. The pertinent part of the order appears in the margin.¹

The order was made after hearing and report by a trial examiner on a complaint by the Commission. The complaint charged that all the petitioners were selling and distributing in interstate commerce to wholesale and retail dealers various kinds of fruit "preserves" which were represented by the petitioners to be "pure fruit preserves" by means of labels, tags, and markers attached to the jars and containers in which the preserves were packed; that the preserves were not preserves or "pure fruit preserves" within the popular meaning of those words in that they did not have a fruit content of at least 45 pounds of fruit to 55 pounds of sugar; and that such products contained mixtures of fruits other than as represented by the petitioners. It was further charged that the petitioners also made such false representations by means of advertising and sales literature. And it was alleged that, as a direct result of such conduct by the petitioners, trade had been unfairly diverted to the petitioners from their competitors which injured competition in interstate commerce in violation of the provisions of the Federal Trade Commission Act (15 U. S. C. A., § 45).

The petitioners answered the complaint by admitting that they were engaged in interstate commerce in selling fruit preserves in competition with others so engaged; that they labelled their products "pure fruit preserves"; and denied that they did any advertising. They admitted that the terms "fruit preserves" and "pure fruit preserves" were synonymous in the trade but denied that they were commonly understood to mean a product made from at least 45 pounds of fruit to 55 pounds of sugar; and denied the allegation that their products were not fruit preserves or pure fruit preserves within the popular meaning and acceptance of those terms. They denied that a fruit preserve was known and understood by the trade and purchasing public as a product prepared or manufactured in the above proportion of fruit to sugar; that their products contained any mixture of fruits other than as specified; and also denied generally any violation of the Act.

Two affirmative defenses were alleged. The first of them appears to have been abandoned and will be disregarded. The second was to the effect that the alleged acts of the petitioners are not, if proved, violations of the Federal Trade Commission Act but that they at most call for proceedings against the petitioners only under the Food and Drug Act (21 U. S. C. A., § 1 *et seq.*).

The evidence introduced was sufficient to support findings which the Commission made to the effect that all the material allegations in the complaint, except as to advertising, were proved; and the petitioners now rely (1) upon error in the exclusion of evidence and the curtailment of the cross-examination of witnesses who testified as to the existence of a standard formula of not less than 45 pounds of fruit to 55 pounds of sugar in the manufacture of fruit preserves; (2) upon failure of evidence of advertising; and (3) upon the affirmative defense that if their conduct subjects them to any proceedings at all such proceedings must be under the provisions of the Food and Drug Acts.

We will deal with this affirmative defense first. It is based on the contention that, as the definition of "false advertisement" in § 15 (a) of the Act (15 U. S. C. A. 55 (a)) excludes labelling, and petitioners have at most but labelled their products, they cannot by so doing have violated the Federal Trade Commission Act. If they are right, of course the Commission had no jurisdiction. This argument, however, fails to take due account of two things. One is that the petitioners' conduct as found by the Commissioner amounted to unfair methods of competition in commerce in violation of § 5 of the Act (15 U. S. C. A., § 45); and the

¹ (1) Using the terms "preserves" or "pure preserves" on labels, tags, markers, or in advertising material, or in any other manner, to in any way designate, describe, or refer to preserve products which are not prepared from a mixture of clean, sound fruit with sugar in the proportion of at least 45 pounds of fruit to 55 pounds of sugar cooked to an appropriate consistency;

(2) Representing, in any manner, whatsoever, that a product which contains a fruit content in a proportion of less than 45 pounds of clean, sound fruit to 55 pounds of sugar is a pure preserve or a preserve, or is anything other than an imitation or substandard preserve;

(3) Representing, in any manner whatsoever, that respondent's products are composed of certain specified fruits when in fact, such products contain a mixture of fruits other than those represented.

other, that the definition of false advertisement in § 15 is expressly limited to that term as used in §§ 12, 13, and 14. The courts have repeatedly upheld the jurisdiction of the Commission to prevent unfair competition by means of false labelling and misbranding regardless of the kind of the product. *F. T. C. v. Winsted Hosiery Co.*, 258 U. S. 483; *Royal Baking Powder Co. v. F. T. C.*, 281 Fed. 744 (C. C. A. 2); *F. T. C. v. Morissey*, 47 F. (2) 101 (C. C. A. 7); *F. T. C. v. Good-Grape Co.*, 45 F. (2) 70 (C. C. A. 6). The last three of the cited cases dealt with unfair competition in the sale of food products. Since the Wheeler-Lea amendment of March 21, 1938, we have three times upheld this jurisdiction of the Commission. *Fiorot Sales Co. Inc. v. F. T. C.*, 100 F. (2) 358; *Justin Haynes & Co. Inc. v. F. T. C.*, 105 F. (2) 988; *Parfumes Corday, Inc. v. F. T. C.*, 120 F. (2) 808. One of these cases dealt with a drug and the other with cosmetics. See also, *Federal Trade Commission v. Kay*, 35 F. (2) 160 (C. C. A. 7), another drug case.

The amendment to § 5 (15 U. S. C. A. 45) of the Act did not modify the term "unfair methods of competition in commerce" but made unlawful what were called unfair or deceptive acts or practices in commerce and by so doing enlarged instead of lessened the scope of the jurisdiction of the Commission. The additions found in §§ 12 to 15, inclusive, were also to give the Commission greater control over the advertising of food, drugs, cosmetics, and the like by providing for criminal action as well as injunction; and only in proceedings under such sections is the definition of false advertisement in § 15 relevant, not in a proceeding like this under § 5.

The only proof of advertising was the interstate sending by the petitioners of price lists to their customers in the wholesale and retail trade describing their products as pure fruit preserves and the representations to like effect by salesmen to such customers. We need not now decide whether that was advertising in violation of §§ 12 to 15, inclusive. Like false labelling, it may have been deceptive and have amounted to unfair competition under § 5, and we need now be concerned with nothing more.

But whether anything the petitioners did was deceptive and in violation of § 5 depends basically upon whether the proceedings which resulted in the finding that there was a known standard for the manufacture of fruit preserves were conducted without harmful error. We do not think they were, and consequently there must be a remand to the Commission for findings after hearings which do afford the petitioners a fair opportunity to develop all the pertinent facts. *Fashion Originators Guild v. F. T. C.*, 114 F. (2) 80, 83.

During the hearings before the examiner the petitioners attempted to make it appear that the addition of pectin during the manufacture of preserves, a practice which has prevailed for years in both commercial and domestic preserve making, changed the requirement for a fixed proportion of sugar to fruit and made it impossible fairly to arrive at the standard the Commission found to have been established. A Dr. Osborn who had testified to this standard had stated on direct examination that some pectin was added in the commercial manufacture of preserves and that the usual domestic practice was to use a cup of fruit to a cup of sugar. On cross-examination the attempt to examine him regarding the home use of a pectin product sold under the trade name of "Certo" was blocked by objections the examiner sustained. The purpose was to show that the recipe widely distributed with this product called for the use of less fruit in proportion to sugar than he had previously testified was used in the home. Similar efforts to show that the standard the Commission found was by no means to be accepted as such because of the varying use of added pectin were made during the examination of witnesses Wallace, Kirkpatrick, and Hader and were frustrated in the same way. The evidence which the petitioners tried to place before the examiner was all relevant and of great importance in deciding what was really the most important issue. This cutting off the right of the petitioners to make clear what the decisive facts were prevented a fair hearing and makes it necessary to send the case back to the Commission for a finding as to a standard after giving the petitioners an opportunity to introduce for consideration whatever material and relevant evidence on that subject they may offer.

It is immaterial that the Department of Agriculture did promulgate a regulation on September 5, 1940, which was in effect when the Commission issued this cease and desist order on September 20, 1940, establishing for preserves or jams a standard content, with stated optional variations, of not less than 45 parts of fruit ingredients by weight to 55 parts by weight of optional saccharine ingredients. That was not an effective standard during the time of the alleged

violations by the petitioners of the Federal Trade Commission Act, and there is no proof that the petitioners have failed to comply with the regulation since it was promulgated.

Cause remanded for proceedings in accordance with this opinion.

Mr. SADOWSKI. That may be inserted at this point.

Mr. DAVIS. Although that was done, yet the Commission did not subsequently change its policy and has not proceeded in any case since except some that were already in the hopper when the Food and Drug Act was passed when nothing was involved except labeling, but there are instances in which it may be important to prove the labeling as well as other advertising to give a whole story, just as these representatives of the Food and Drug Administration mention with respect to their cases.

Since then there has been no conflict. As a matter of fact, there never was any conflict. They would refer to us advertising and we would refer to them labels. And the chief examiner has handed me files here of 61 letters—that is, carbon copies—which were written to the Food and Drug Administration referring to them labeling cases which had come to the Federal Trade Commission and 17 other letters here in which they wrote to the same effect to the applicants for complaint. These were written within the past 2 years. Before that, they did not keep a separate file on them, although the policy was followed prior to that.

Many complaints that come to the Federal Trade Commission do not go to the chief examiner but are referred by the Commission to the Food and Drug Administration and other departments.

Those are the facts about that.

Mr. Chairman and gentlemen, I realize that the time is passing away rapidly. I had wanted to discuss the record of the attorneys who appeared before this Commission.

With your permission, I would like to let Mr. Whiteley read these papers here, and then I would like to be excused about 5 minutes.

Mr. REECE. You plan to return?

Mr. DAVIS. Oh, yes.

Mr. WHITELEY. Cases before the Federal Trade Commission. Isaac W. Diggs: In five cases cease and desist orders were issued by the Commission, no appeal taken; three cases dismissed after complaint had issued on final hearing or during course of trial; three cases now pending; total of 11.

James F. Hoge: In one case during the preliminary investigation by the Chief Examiner's Division—

Mr. REECE. Are those the only cases Mr. Diggs has appeared in before the Commission?

Mr. WHITELEY. They are all of the cases in which he has appeared before the Commission.

James F. Hoge: In one case during the preliminary investigation by the Chief Examiner's Division of the Federal Trade Commission, his firm filed a proceeding in the United States District Court for the District of Columbia seeking to prevent the Federal Trade Commission from requiring warnings with respect to their products. The United States district court dismissed their petition. They appealed to the United States circuit court of appeals, which sustained the lower court. They then filed a petition for certiorari to the United States Supreme Court in the case, and such petition was denied by the Supreme Court.

Mr. Hoge has two cases pending in which testimony is being taken. These cases involve so-called headache remedies which the complaint charges are habit-forming and that continued use is dangerous to health and frequently causes mental derangement. The complaint alleges that the advertisements of the headache remedies in question are false because they fail to reveal the dangers incident to using the drugs as directed in section 15 (a) of the Wheeler-Lea amendment to the Federal Trade Commission Act, which the Reece bill would greatly weaken, and in which Mr. Hoge, naturally, has a very great personal interest.

In that connection, we invite the committee to examine the files in these cases or in any of the cases which are being tried, or which have been tried in the past, and see for yourselves whether you think the Commission is unfair or has denied any respondent any right to which he was entitled, or whether, in your opinion, the Commission has failed to decide its cases according to the preponderance or greater weight of the evidence.

Rogers, Hoge & Hills—that is the firm of which Mr. James F. Hoge is a member—had two cases in which cease and desist orders were issued, no appeal taken. One case in which a cease and desist order issued. It was appealed, and the circuit court of appeals set aside the order of the Commission without prejudice to the right of the Commission to reopen proceedings and offer additional proof. One case was dismissed by the Commission on final trial. Three cases charging misrepresentation of efficacy of product and failing to disclose harmful potentialities pending. Those are the three so-called “headache” cases. Two other cases charging false advertising pending.

Kenneth Perry: Had three cases before the Commission in which cease-and-desist orders were issued, no appeal was taken in any of them.

The firm of Mock & Blum, of which firm Mr. Hugo Mock testified before the committee, have had seven cases before the Federal Trade Commission in which cease-and-desist orders were issued and no appeal taken. One case in which a cease-and-desist order issued and appeal to the circuit court of appeals was taken, which affirmed the Federal Trade Commission order. Petition for certiorari applied for and denied by the Supreme Court. One case was appealed to the circuit court of appeals and affirmed. One case was dismissed by the Commission after complaint had issued on final trial, and one case is now pending on trial.

Mr. REECE. What does that show? Anyway, Mr. Hoge's firm has had many more cases before the Commission than you have indicated, and possibly the other attorneys have other cases also.

Mr. DAVIS. I will tell you what it shows. It shows that these gentlemen all had cases, and when they appeared before the committee they did not complain about their own cases. They complained about somebody else's cases, in which I am sure they had never read the record except maybe the decision of the court.

Mr. O'HARA. Do you have Mr. Montague's record there? He testified here.

Mr. DAVIS. No; I do not have it here, because I got this up after the attorneys for the respondent got through with their statements.

I will say that, generally, he won some of his cases, and he has lost some of his cases.

Mr. O'HARA. About the way the average lawyer in court does, Judge; that is about the way all of us are.

Mr. DAVIS. That is true. For instance, in the case of Mr. Digges, I want to read a letter that Mr. Digges wrote. As I said, they picked out somebody else's cases, some of them the same cases that they harped on when the Wheeler-Lea bill was pending, and, as I said, out of the thousands and thousands and thousands of cases that the Federal Trade Commission has tried, they picked out a few, and we have shown you the facts in those. And even if the Commission did make some mistakes, and I do not doubt but what we have—we do not claim to be infallible; I do not know of any court that is infallible—the Commission has only been reversed by the Supreme Court, I think, once in the past 12 years, and that was by a 5-to-4 decision after the circuit court of appeals had affirmed us. There was a strong division there. Men differ. If they did not differ, why have five men instead of one on the Commission? If you permit appeals to the 11 different circuit courts of appeals, all of them to be tried *de novo*, you may on close cases, or anything like close cases, get separate opinions in various different courts, because men are not always of exactly the same mind.

Mr. Digges made one statement that I do not think has been answered and that is he said—I believe he is the one—that different rules with respect to subpoenas were invoked. I say there is no such thing. Anybody can get subpoenas that ask for them, but on subpoenas *duces tecum*, the Commission will not issue them except upon the vote of three Commissioners, because that is akin to search and seizure, and we do not think they ought to be issued against anybody except and unless they are strictly within the law, but we grant them to the respondents when they make a proper showing and file an affidavit. All of the staff of the Commission are under oath in the performance of all their duties.

We have had no appeals from Mr. Hoge or anybody else, Dr. Digges or anybody else that I know of.

Mr. O'HARA. I do not know who it was testified, which one of the witnesses, but he did complain about the fact that in order to get a subpoena to subpoena a Bureau of Standards' witness that it did require an order of the Commission which he said was denied him.

Mr. DAVIS. No; I beg your pardon. He said that the man who made the test in the Bureau of Standards told him that they had made the tests for the Federal Trade Commission and that they could not give him a copy of their report unless the Federal Trade Commission said so, and he admitted that he never did ask the Commission to do it.

There was no denial by the Commission. He never applied to the Commission.

Mr. WHITELEY. Mr. Digges made one statement before this committee, and when I wrote him about it he made another statement in answer to my letter, the first statement being that he had tried to get a subpoena but that the trial counsel would not give him permission; that is, the trial counsel for the Federal Trade Commission.

In answer to my letter he said that he had not applied to anybody at the Commission because the man he contacted at the Bureau of

Standards had said he could not get permission from the Federal Trade Commission.

And I thought I had made it clear. I attempted to make it clear to the committee, that Mr. Digges knows well enough, he used to work for the Commission, he was one of our investigators, he knows better than most other lawyers who practice before the Commission that all he had to do was to apply to the secretary of the Commission or to the trial examiner for a subpoena, a plain subpoena, and it would be granted without question.

And I think Mr. Digges has been less than frank with this committee in that.

Mr. O'HARA. You claim his testimony was not substantially true?

Mr. WHITELEY. Mr. Digges, as I say, with respect to the Bureau of Standards' subpoena, told one story to the committee, another story to me in his letter, and I leave it to the committee to decide whether either of them was accurate or truthful.

Mr. DAVIS. Gentlemen, Mr. Digges also was talking about this horrible procedure of the Commission, and, like most of those testifying for the bill, made many statements that were untrue and others that were distinctly misleading.

For instance, after he was talking about the experience on appeals, et cetera—

Mr. REECE. Perhaps the justification of that statement you have just made would depend upon the viewpoint from which one is looking at the matter. If they made untrue statements you should point them out for the benefit of the committee or, failing to do so, you should not characterize their testimony in that way.

Mr. DAVIS. I do not know about that. I think I know what the facts are, and I say that advisedly and with no apology.

Mr. REECE. You said there was no conflict in jurisdiction, and here is a statement of the Court in the Willard Tablet case in which it held:

A Commission order to be res adjudicata against the Food and Drug Administration—

Mr. DAVIS. That is not material to what I am saying.

Mr. REECE (continues reading):

we therefore have the incongruous situation of one branch of the Government approving the method now pursued by the claimant and another branch seeking to condemn it.

That would seem to be pertinent to the question of dual jurisdiction, but again possibly it depends on the viewpoint from which one views it.

There are other questions that I want to ask this afternoon. I do not want to preclude myself from asking further questions.

Mr. DAVIS. I will stay here all night if that will do you any good. I will answer your questions.

By the way, you asked the young lady who prepared her statement.

Mr. REECE. Be careful; do not overstate my question. I asked her—did I not?—if she had assistance from some source.

Mr. DAVIS. All right; assistance, then. I just want to say in that connection, that the Commission and its staff so far as I know and am advised, and I think I am correctly advised, did not have a thing on earth to do with the preparation of the statements of any of those ladies.

MR. REECE. That is the second time that you have stated that, Judge, and we accepted it at face value in the first instance.

MR. DAVIS. I want to ask if you mind answering a question. Do you mind telling us who is preparing those various questions about cases that you have been propounding all during this hearing?

MR. REECE. Many of the questions I have asked have been of my own initiative. I got information as the basis for some of the questions, from various sources. I got some of the information from some of the attorneys who testified.

MR. DAVIS. I see some of them have been here ever since they testified. I wondered.

MR. REECE. I have no hesitancy in any particular question of advising you fully at any time from what source I obtained my information if you are interested and feel it would be helpful.

MR. DAVIS. All right.

MR. REECE. But I might add, Judge, that most of these questions have been based upon the decisions of the court and upon the actions of the administrative agencies which they have revolved around. As to who assisted me in getting the decisions of the court is not altogether pertinent except as an indication of people who might be interested in the development of the case.

MR. DAVIS. May I have a little time?

MR. REECE. You asked me a question.

MR. DAVIS. All of the witnesses who appeared in favor of this bill, with the exception of Dean Stason admitted and showed their interest.

Somebody asked if they did not have a right to do that. Why, yes. There is not any question about their having a right to appear.

However, when you go to weigh their testimony, you have the right, and if you were a juror, the court would have always instructed you that you should look to the interest of the witnesses and give them such credit as you think they are entitled to.

MR. REECE. So that there will not be any misunderstanding that anybody appeared here under false colors, each witness was asked to give his name and identify himself.

MR. DAVIS. I say they admitted they were either representing their clients or that they were representing magazines which are dependent upon the drug industry.

MR. REECE. Each of them stated in what capacity he appeared.

MR. DAVIS. I said that was said.

I want to get back to this: Congressman O'Hara asked this question of Mr. Digges:

MR. O'HARA. Mr. Digges, in your practice in the appellate matters, I assume the appellate court, or the circuit court, from time to time, have stated that they have found the facts different in stated cases, but under the rule established they would not disturb if there was any evidence to support. They have affirmed the decision.

Mr. Digges stated:

MR. DIGGES. That has been the language of the court, sir, in some cases. It doesn't happen to have been my own personal experience. I want to say this in all fairness to the Commission: I have never had to appeal a Commission decision, so that what has happened on appeal is something of which I do not have any personal knowledge.

I think I just showed that he had 11 cases.

MR. O'HARA. In my question I was stating the general rule in appellate cases from administrative bodies or triers of facts.

Mr. DAVIS. I think you were eliciting his experience that he had had on appeals. He was talking about the Federal Trade Commission.

Another thing about Mr. Digges: After the passage of the Wheeler-Lea Act, something more than a year after, on April 28, 1939, I received this letter from Mr. Digges:

EWIN L. DAVIS, Esq.,

*Federal Trade Commission,
Washington, D. C.*

DEAR MR. COMMISSIONER: The enclosed advertisement of Bristol-Myers Co., published recently in the metropolitan press, seems to be symptomatic of a trend among the more responsible drug manufacturers, and as such, might be of more than passing interest to you.

To me, it was illustrative of the deep effect which Federal Trade Commission rulings and decisions have had not only upon the manufacturing processes of reputable drug manufacturers, but upon the type of representations which they are making to the public. There appears to be, among such manufacturers, a growing sense of their duty to the consuming public, and I feel that the Federal Trade Commission has been largely responsible for that result.

Sincerely yours,

I. W. DIGGES.

I do not have time to go through all of these. I would like to reply to several things Mr. Hoge said.

Mr. REECE. You are quoting from witnesses now who might have a personal interest.

Here is a statement by Judge Martin, of the Sixth Circuit Court of Appeals. He says:

Our practical function in review of rulings of administrative boards has been reduced to reading records for possible discovery of that rare case wherein there is no evidence however slight from which the Board could reasonably have drawn inferences upon which a finding of fact was based.

What interest was Judge Martin serving when he made that statement, do you suppose?

Mr. DAVIS. In the first place, he was talking about some Board. He never mentioned the Federal Trade Commission. He never mentioned any Commission in his article, but in order to follow it out farther, I had the records looked up of cases which had been tried by the Sixth Circuit Court of Appeals since Judge Martin had been on that court, and asked as to how many of them he had participated in. I have the records here.

Since he went on that court September 16, 1940, that court has decided five cases, affirming the Commission in four of these, and the Commission's order was set aside in one of them, but that decision was subsequently reversed by the Supreme Court.

As a matter of fact, Judge Martin never sat in any of these cases. He has never participated in a Federal Trade Commission case, showing that he could not have been talking about the Federal Trade Commission. And besides, as I said, his article shows that he was talking about a Board.

Mr. REECE. Judge Groner said in his letter to the Attorney General:

Judicial review of administrative decisions might be expanded to include a review of the findings in light of the weight of the evidence just as a trial judge may set aside a jury's verdict on this ground.

Mr. DAVIS. I know, you can read extracts from decisions, and the extract that you read from Judge Martin was not referring to the

Federal Trade Commission. That is the reason that we put his whole statement into the record and let the members of the committee read for themselves.

Mr. REECE. The judge said in the Baney case:

The Trade Commission, like many other modern administrative legal experiments, is called upon simultaneously to act the roles of complainant, judge, jury, and counsel.

I do not know what interest the judge would be or was serving there.

Mr. DAVIS. Mr. Chairman, Congressman Reece is not asking any questions. He is not seeking enlightenment. He is simply trying to inject these different things into my statement and I do not think it is fair. It is not according to the rule of the committee or any of the other congressional committees that I have any knowledge of.

Mr. SADOWSKI. Maybe he is appearing as a witness for himself.

Mr. DAVIS. I think I ought to get in my statements.

Mr. REECE. I want to ask if you agree with this statement because it was made by one of the witnesses who appeared for the Federal Trade Commission, Mr. Montague—

Mr. DAVIS. I do not care to pass upon it. That is not relevant.

Mr. Chairman, I ask that I be permitted to finish my statement—I know you are going to have to adjourn pretty soon—and not be constantly interrupted by Mr. Reece, who is not doing it to seek enlightenment. He is doing it to interfere with the record and take up our time.

Mr. REECE. My purpose here is to develop some information on the three major points involved in the bill.

One of them is very pertinent: This quotation in the Harriet Hubbard Ayer case, in which the Commission's order was reversed, says:

The rule is now well recognized that the finding of fact by the Commission, having any evidence to support it, is conclusive and binding upon the courts, and we may not review the weight of the testimony.

Mr. SADOWSKI. That was discussed by Mr. Kelley previously.

Mr. KELLEY. I may say this, that if a question of an administrative tribunal exercising the mandate of Congress was relevant under this bill, it would be very well for you to call Judge Groner and Dean Pound and Justice Martin about statements that they have made that I have heard and their writings. I do not want to speak for them. I do not think that they fundamentally believe in administrative tribunals as they have been constituted by Congress. That is a matter for the Congress. That was a matter that for 3 years they have been thrashing out with all of the different bills that were considered which crystallized in the House, in the bill of Mr. Summers, the chairman of the Judiciary Committee, and over in the Senate.

I confidently predicted it would not be long until those bills are passed. Those bills deal with the question of judge, jury, and prosecutor among a great many other things.

Your amendment does not deal with that question. If it did, Justice Groner and Justice Martin that you mentioned, would be witnesses for you, because I do not think they would believe in an administrative tribunal as they are constituted by Congress, but Congress did so constitute them. They are constitutional. No one has ever intimated that they were unconstitutional. The courts have pronounced them time and time and time again as constitutional. It is not a question of

being in or out of the Constitution. It is constitutional. The point is that they have nothing to do whatsoever with the amendment here.

We are talking about H. R. 2390.

Mr. REECE. I will not press these quotations as a basis for my question, because I do not want to cause anyone to become impatient, neither do I want to consume the time of the committee, but when a court makes a statement as was made in the Harness case, for instance, in which it was said:

It follows there will be no occasion to resort to the record on which the findings were based unless it is alleged that there was no evidence to support a particular finding and then it would be necessary to examine only so much of the evidence as pertained to that subject—

And numerous other ones. I am not going to go farther, but in view of these findings of the court, in view of these statements by the court, I can understand how respondents might feel ill at ease because, in view of that very strong statement of the court—

Mr. KELLEY. The statement that you just read from, that and all of these things that you pick out need explanation.

When the Federal Trade Commission was created back in 1914, it was the second administrative tribunal of the United States Government. The only one that antedated it was the Interstate Commerce Commission. I do not know how long ago that decision was. That was a price-fixing conspiracy case that you mentioned, decided by the circuit court of appeals at Cincinnati, and it must be over 15 years ago. The Commission had a long, elaborate set of findings in that case that it made after trial, every one of which findings was approved by the circuit court of appeals and the order of the Commission was affirmed by the circuit court of appeals.

You picked that sentence out of that decision rendered by that court in a price-fixing case nearly 20 years ago.

I do not think that is quite according to Hoyle. It does not prove a thing.

Mr. SADOWSKI. That same gentleman may have changed his mind by this time?

Mr. KELLEY. Exactly.

Mr. SADOWSKI. You may proceed.

Mr. DAVIS. Kenneth Perry, one of the witnesses favoring the bill, made this statement:

I do not think there would be many cases, Mr. O'Hara, because most of them are wrong. The Commission is generally right; the Commission is right in an overwhelming percentage of the cases. Most of the cases should not even be tried. If the attorneys were familiar with the law, they would not try many of these cases, because their clients are wrong, the practice is bad from the beginning, they shouldn't be in it. * * *

As I say, it is patently bad practice, as a rule, on the part of the company.

And then Robert L. Swain, who is the editor of Drug Topics and Drug Trade News, made this statement: "It [the Reece bill] is a step in assuring justice in those relatively small number of cases in which the question of justice is still open."

Gentlemen, everybody recognizes that the number of cases they complain about are infinitesimally small, and we think they are wrong in their complaint with respect to at least most of those.

There is an effort to break down the procedure of the Federal Trade Commission, including a proposal that has never been made before in any bill before any previous committee or subcommittee.

The question is whether in order to favor a few, a very small percentage of people who are not willing to stop the unfair practices, you are willing to make it most difficult to protect the public health and the public interest.

This bill has been pending more than a year. There has been a tremendous amount of propaganda in behalf of it. Some of these trade magazines said that James F. Hoge wrote the bill and it is also reported that he wrote two statements, extension of remarks, that Congressman Reece put in the Congressional Record.

Mr. REECE. Without attempting to answer either of your statements because that is unnecessary, I think they are entirely improper, although I do not care for them being in the record, but I might say, for the benefit of the record, that at the time this bill was introduced, I probably had met Mr. Hoge but I had no recollection of having met him and he had not talked with me about it. The first man who spoke to me with reference to some of the difficulties which this bill seeks to cure was a very good friend of mine at home who enjoys a high reputation in social, church, and business affairs. It is unnecessary to call his name but he as a citizen had every right to be interested and discuss the matter with me. I am sure neither members of the committee nor of the House will appreciate these extraneous remarks by you.

These imputations which you undertake to make, Judge, do not disturb me in the least, but I think, certainly, it hardly proper, Mr. Chairman, for a witness to make statements of that type before the committee, but I do not want the committee to rule on that. I want to leave that entirely to the judgment, discretion, and sense of propriety of the witness.

Mr. DAVIS. I am perfectly willing to compare propriety with you any day.

Now, Mr. Chairman, during that year articles have been appearing in these magazines which are supported by the drug and cosmetic industries as well as others.

Mr. REECE. But I might—

Mr. DAVIS. They had articles at first in which they were complaining that the trade was not taking any interest.

Mr. REECE. But I might add, if the judge will permit, in connection with the statement I made, if the Federal Trade Commission should cast those insinuations against a Member of Congress because he introduced a bill, then I can well understand the apprehension that an attorney who appears before the Federal Trade Commission might have in appearing before a committee to testify in favor of a bill of which the Federal Trade Commission disapproves. And what has been said by some members of the staff of the Federal Trade Commission and the member who is now appearing, and the spirit in which the statements were made, I can well understand would give grounds for apprehension on the part of the attorneys appearing before the Commission that they might be recriminated against.

And when the members of an agency that is a quasi-judicial agency appears before a committee and manifests that spirit, I think it is an

unwholesome indication and a further justification of the necessity of having an adequate court review of their decisions and that is the chief thing one phase of this bill undertakes to provide.

Mr. DAVIS. We have no objection whatever or any resentment against a statement of facts, but we do object to misstatement of facts. That is all.

Mr. SADOWSKI. Of course, the committee is not aware of any attorney basing any complaints, placing any complaints or recriminations against the Commission.

Mr. REECE. They made it plain that they did not. The witness for the Commission has tried to put them in the position of having done so. I heartily agree with you, Mr. Chairman, that they did not do so, and neither did the member who introduced the bill intend any reflection. Any such insinuations by the witnesses for the Commission are unfortunate. The only explanation which immediately occurs for making them would be an inward feeling of justification for the views expressed by the proponents of the bill.

I do not think the suggestion that adequate right of appeal be provided really casts any reflection upon any one, just as providing the right to appeal from one court to another casts no reflection upon the court; that is, upon the court from which that decision is appealed.

Mr. DAVIS. I am perfectly willing to let those who know us decide. There are a large number of Members in Congress who served with and know Commissioner Ayres and me, and they know many of the others. I am willing to leave that matter as it is.

However, I think that some degree of responsibility in that regard rests upon a Member of Congress in considering a bill and voting on bills that will affect the public interest as much as this bill will, and so that is that.

Mr. Chairman and gentlemen, I do not know how many letters the author of this bill has written to people soliciting them to come and speak in favor of the bill. I have seen quite a number. And I have heard of quite a number more. And he certainly manifested very great activity in behalf of his bill, both before and in the hearings, so that is that. And he has, as I started to call your attention to, a lot of help. For instance, all along, first these magazines complained that the industry was not taking any interest in the bill and calling on them to do it, and so forth.

Here is one, Drug Trade News, July 16, 1945. The author is Mr. Robert L. Swain who appeared as a witness. Of course, his constituents are the drug people. Just before you started your vacation last summer, he had this: "See them at home. As it is now settled that Congress cannot get around to a consideration of the Reece bill until after the summer recess, we earnestly urge drug-industry members to do their best selling job on their Senators and Congressmen while they are home for the vacation period."

Mr. SADOWSKI. They evidently did a good job, because they got the hearing on the bill.

Mr. DAVIS. I have various other magazines. This went on. Here is a full page calling for help. And here is another magazine, the N. A. R. D. Journal, which just came out the other day, and this article is written by George H. Frates, their Washington representative, who appeared here.

Mr. REECE. There is a picture on this side of the cover that is attracting the attention of the committee.

[Laughter.]

Mr. DAVIS. Well, there is a comparison, one of the more conservative kind.

Mr. REECE. Do you have the editorial from Printers' Ink; are you going to put that in the record?

Mr. DAVIS. I will put the editorial in, yes. Get me that editorial. I ask that it be inserted in the record.

(The matter referred to is as follows:

[From Printers' Ink, a journal for advertisers, September 1, 1938]

WE RECENT

When the late unlamented Tugwell food and drug bill was being fought by advertisers as the thoroughly iniquitous and impossible piece of legislation that it was, there was introduced into the House a measure known as the Mead bill. Sponsored by the Proprietary Association, it was written by our good friend, James F. Hoge.

We twitted Counselor Hoge quite a bit at the time—both in person and in print—for providing that the Federal Trade Commission rather than the Food and Drug Administration should enforce the proposed law.

In most other respects the bill was good—as good as the present Copeland law or perhaps in some respects, even better.

The thing that condemned it in Printers' Ink's estimation, though (and we had plenty of company) was the Federal Trade Commission angle. We believed that Federal Trade Commission enforcement would be practically the same as no enforcement. We did not question the integrity or ability of the Commissioners. But having in mind the fishing expeditions and the interminable procedure that had characterized FTC activities, we feared that the whole enforcement proposition would become so lopsided and top-heavy that it would get nowhere.

Came the Wheeler-Lea amendment to the Federal Trade Commission Act. This proposed that the Commission should have jurisdiction over the advertising of foods, drugs, cosmetics, and devices. We thought—and still think, for that matter—that it would be better to give the Food and Drug Administration authority over advertising as provided for by the excellent Copeland bill which, since then, has become law. But Secretary Wallace, under whose general direction the Food Administration operates, had some jealous enemies in the House. Furthermore, the FTC, understandably enough, wanted more power. The anti-Wallace people and the pro-Commission element had their way.

Thus today we have the Copeland law setting certain standards for the production and merchandising of foods, drugs, and cosmetics. We also have the Wheeler-Lea amendment providing that the matter of enforcing advertising regulations in these commodities shall be in the hands of the Commission.

Strange to relate—and unexpectedly, too, so far as Printers' Ink is concerned—the thing works.

Last week in this paper it was shown that under FTC regulations and procedure an actual revolution in copy writing has come about in the few short months since the Wheeler-Lea amendment has gotten under way.

Advertisers have been called to account and almost without exception they have signed stipulations to the effect that in the future they will agree to abstain from certain practices.

True, they could have done all this voluntarily and under their own power. In these pages during the last 5 years they have been urged repeatedly to cleanse their advertising of what they knew was questionable. This, however, is beside the point. The fact remains that they have done it now. Advertising, as a result, is going to be more powerful as well as better. These changes, made under the Commission's prodding, will do much to keep and increase the confidence of the consumer.

Our respectful salutations, then, to the Wheeler-Lea amendment and the Federal Trade Commission.

Advertisers—including those who have been called to account—will, we believe, join us in this sentiment.

Mr. REECE. What ulterior motive might Printers' Ink have in discussing this bill?

Mr. DAVIS. This is in the February 18, 1946, issue of N. A. R. D. Journal: "NARD supports Reece bill." They go on here and first they say they advertise in different newspapers, then, "If a manufacturer placed an advertisement in a newspaper having a circulation of 250,000 and then were found in violation by the Federal Trade Commission, each separate copy of the newspaper could be cited as a violation in penalizing the manufacturer."

Now, that, certainly, casts a lot of reflection on the Federal Trade Commission and on the courts, because no fine can be imposed except by the court, and to say that a court would make such a finding as that is simply violently contrary to what has happened in the past 8 years under the Wheeler-Lea Act.

Those facts have already been filed here showing that in only one case was there as much as \$10,000 fined against a man and he was selling an absolutely worthless remedy, according to the evidence, as a cure for tuberculosis.

Then they go on here and state that this bill is pending before the Committee on Interstate and Foreign Commerce of the House, and that they had filed a brief supporting the intent of H. R. 2390. Then they say, "We urge our members who live in States having Representatives on the House Committee on Interstate and Foreign Commerce to ask that they support the Reece bill," and then they go on and give the names of the committee. These letters are already coming in because we had one sent down to us yesterday by a Member of Congress. It had ridiculous statements in the letter and in the memorandum that accompanied it that had been sent to this druggist, and he wrote in to ask his Congressman about it.

Mr. O'HARA. I would like to say in connection with Dr. Swain's article, I do not recall anybody out home talking to me last summer, and I do not recall receiving over one or two letters from the entire State of Minnesota with regard to the Reece bill.

So the advertising is not very effective from my viewpoint of your statement.

Mr. DAVIS. I suppose it did not work everywhere.

Mr. SADOWSKI. It is now 5 o'clock and perhaps you can extend the balance of your statement in the record. I do not want to stop you, but I think you have just about concluded your main statement, and if you have some other things, perhaps you can put them in the record.

Mr. DAVIS. All right, Mr. Chairman.

Mr. SADOWSKI. With the exception of a few statements that will go in the hearings, that will complete this hearing.

Mr. DAVIS. The Federal Trade Commission designated Commissioner Freer to make a statement before the Commission, too. He has been ill, recovering from the effects of the flu. He was out of the city for a while but he is back, and here, and I would like for you to hear him.

Mr. FREER. I would take about a minute, Mr. Chairman. That is all I want.

STATEMENT OF ROBERT E. FREER, MEMBER, FEDERAL TRADE COMMISSION

Mr. FREER. There is only one phase they asked me to talk about. My name is Robert E. Freer, member of the Federal Trade Commission for the past 11 years.

Mr. SADOWSKI. We will grant you permission to revise and extend your remarks.

Mr. FREER. All I was asked to talk about was that analogy of the prosecutor, judge, and jury, and I can do that very readily by handing you a copy of this statement on that subject, if you will put that in the record.

Mr. REECE. I have very great respect for Commissioner Freer's judgment and views.

Mr. SADOWSKI. We will let that go in as part of your statement.

Mr. FREER. Thank you very much.

Mr. DAVIS. We would like for the statement he has handed in to read not as a quotation but as his statement, in the large type, because he is presenting that as his statement.

Mr. SADOWSKI. It will go in as his statement.

Mr. REECE. In the same size print as if he had made it himself.

Mr. DAVIS. That is right. It covers some subjects that really have not been discussed and if the committee will read his statement, it will be illuminating and interesting.

(The statement referred to is as follows:)

PRACTICE BEFORE THE FEDERAL TRADE COMMISSION

Mr. FREER. One of the most serious problems facing the average practitioner at the bar today roots in the general trend toward providing administrative procedures to supplement or replace the traditional judicial processes. Determination of a host of controversies, historically in the province of the courts, has been placed in the concurrent or exclusive jurisdiction of boards, commissions, and other administrative or quasi judicial agencies.

Effects of this shift are many and of varied importance. To a large extent the technicalities of pleading and to some extent even the rules of evidence have been relaxed. Limitations have been placed upon the power of the courts to review orders of administrators—and where powers of review are granted, the courts are often limited to so-called questions of law.

I should like to outline briefly for you the substantive part of the work of the Federal Trade Commission and then to sketch its procedure and the manner in which its varied tasks are handled.

NATURE OF COMMISSION'S JURISDICTION

The Federal Trade Commission Act and the Clayton Act were both enacted in the fall of 1914 to supplement the Sherman Antitrust Act. The Clayton Act prescribed a number of specific business practices which were considered as contributing to monopoly, such as certain types of price discrimination; contracts tying several articles of commerce together for purposes of sale; exclusive dealing contracts; ac-

quisitions of capitol stock of competing corporations and interlocking directorates.

The Federal Trade Commission Act, however, contained no such detailed list of unlawful practices. It created a Commission of five members for the purpose, among others, of "preventing unfair methods of competition in commerce."

In the words of the Supreme Court in the *Schechter* case,¹ this was "an expression new in law." And as the court said further:

Debate apparently convinced the sponsors of the legislation that the words "unfair competition," in the light of their meaning at common law, were too narrow. We have said that the substituted phrase has a broader meaning, that it does not admit of precise definition, its scope being left to judicial determination as controversies arise.

The jurisdiction thus conferred upon the Commission is by language broad enough to permit of flexibility of administration while containing adequate legal standards for the guidance of both the Commission and the courts.

It is my opinion that this was indeed a fortunate approach to the problem from the standpoint of good administration. The Commission was designed to be an expert body, trained and experienced in the problems of business relationships. While a list of all the practices considered in 1914 to be detrimental to the public and to honest businessmen might have been attempted and the results incorporated in the form of prescriptions in a statute, no one could foretell what unfair practices might in the future be devised, or what practices, then considered unobjectionable, might under new conditions become undesirable.

In the public interest, the Commission has exercised jurisdiction over many methods and practices which are also actionable under the common law, such as fraud and deceit, boycott, restraint of trade, and monopoly. In addition, its jurisdiction has been upheld by the courts over many types of cases which could not be reached at common law. For instance, in an action for fraud and deceit, reliance on the false representation, and injury flowing from such reliance, must be shown at common law. The Federal Trade Commission may proceed against use of false advertising in commerce as an unfair method of competition without proving actual deception of any customer, providing the advertisement is characterized by what the Supreme Court has called "an inherent capacity and tendency to deceive."

But the principal dissimilarity between the common-law action and the procedure of the Federal Trade Commission springs from the fact that the Commission acts *ex parte* and only where substantial public interest is involved. Private controversies between competitors, where a private remedy at law is available, are seldom entertained by the Commission and then only where substantial public interest is involved. And even in such a case, the aggrieved competitor is not a party to the proceeding.

Restraints of trade and monopolistic practices which at common law would reach the courts only when enforcement was sought or when someone was particularly injured, may be curbed by the Commission through a proceeding initiated upon its own motion solely for the benefit of the public.

¹ 295 U. S. 495, 55 Sup. Ct. 837, 79 L. ed. 1570 (1935).

The Federal Trade Commission, exercising the broad jurisdiction granted to it by section 5 of its organic act, in formal cases has held numerous practices and methods of competition to be unfair methods of competition, and, in the large majority of its cases, it has been sustained by the courts. Practices and methods which are generally regarded as falling within the prohibition of section 5 when carried out in commerce or when substantially affecting commerce, include—

- (a) Comination or conspiracy to fix or control prices.
- (b) Combination or conspiracy between competitors to hamper or obstruct business of rivals.
- (c) Misbranding, mislabeling, or misrepresenting products as to composition, origin, quality, or source.
- (d) False and misleading advertising.
- (e) Passing off one's goods as those of another.
- (f) Sale of products by means of lottery or chance devices.
- (g) Concerted refusal to sell or refusal to buy where the effect is to suppress competition.
- (h) Monopolization of trade channels.
- (i) Combination and conspiracy to obstruct a competitor's source of supply.
- (j) White-listing, black-listing, or other forms of concerted boycotting.
- (k) Commercial bribery.
- (l) Threats of litigation not in good faith.
- (m) Disparagement or misrepresentation concerning a competitor.
- (n) Causing breach of contract between competitor and customers.
- (o) Secret control of a supposed competitor.
- (p) Unfair use of patent rights.
- (q) Full line forcing.

WHEELER-LEA AMENDMENTS TO THE ACT

An important opinion of the Supreme Court of the United States affecting the Commission's jurisdiction was handed down in the *Federal Trade Commission v. Radcliff*.² The Commission had proceeded against the advertiser of a patent reducing compound for representing it to be safe and harmless. It was found that the medicine contained desiccated thyroid, a potentially dangerous drug. Appeal was taken from the Commission's cease and desist order to the Circuit Court of Appeals for the Sixth Circuit. That court, sitting in Cincinnati, reversed the Commission's order, holding that the only competitors affected by the practice were guilty of substantially similar conduct. The Supreme Court upheld reversal of the Commission's order, stating that there are three essential jurisdictional elements to a Commission proceeding against "unfair methods of competition." First, a method must be unfair. Second, a method must injure or affect actual or potential competitors, and third, there must be substantial public interest in the prevention of the method of competition. The court stated that it doubted that the Commission was intended to "protect one knave from the unfair competition of

² 283 U. S. 643, 51 Sup. Ct. 587, 75 L. ed. 1324 (1931).

another." The effect of this decision was to make the Commission's protection of the consumer merely an incident to the protection of honest competitors, likewise injured by the practices of unethical traders.

This was considered by the Commission to present a serious defect in its act and recommendations were made to Congress for curative amendments. As early as 1935, bills were introduced in Congress in response to these recommendations and for the purpose of amending the act. In March 1938 the Wheeler-Lea Act was passed and approved, making the first direct amendments to the Federal Trade Commission Act since its original passage in 1914. The principal change effected by the Wheeler-Lea Act broadens section 5 to make unlawful "unfair or deceptive acts or practices" as well as "unfair methods of competition." Under the new language, it will not be necessary for the Commission to allege or prove injury to competition where an act or practice in commerce can be shown to be unfair or deceptive and that there is substantial public interest in its prevention.

Seven entirely new sections were also added by Congress to the act and five of these implement the Commission with definite and specific power over the dissemination of false advertisements regarding food, drugs, curative devices, and cosmetics. A highly interesting section relating to advertising of the products directs the Commission "in determining whether any advertisement is misleading" to take into account, among other things—

not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual.

The Commission is given additional and specific jurisdiction over advertising of food, drugs, curative devices, and cosmetics when disseminated in interstate commerce by any means; or when disseminated either locally or in commerce where it is intended or is likely to induce a purchase in interstate commerce; or when disseminated by United States mails irrespective of commerce.

Another new section empowers the Commission, when it has reason to believe that a party is engaged in or is about to engage in the dissemination of any false advertisement of food, drugs, curative devices, or cosmetics, in violation of the act, to seek an injunction in any district court of the United States. These courts are directed, upon proper showing, to issue a temporary injunction or restraining order. About 1 month ago, the first injunction under this new section was granted in the Federal district court in Chicago, restraining the advertisement of a reducing compound which the Commission had reason to believe was dangerous to health.³

Another new section makes it a misdemeanor to violate the provision forbidding false advertisement of food, drugs, curative devices, or cosmetics, if violation is with intent to defraud or mislead or if the suggested or customary use of the commodity advertised may prove injurious to health. When the Commission has reason to believe the

³ *F. T. C. v. Harry Goron, Trading as Isabella Laboratories and the Hartman Chain of Drugstores* (D. C. Ill., September 1938).

party has violated this section, it is to certify the facts to the Attorney General. A party may be punished upon conviction by a fine of up to \$5,000 or by imprisonment of not more than 6 months. Second offenders run the risk of fines up to \$10,000 and imprisonment for 1 year.

Other amendments are made by the Wheeler-Lea Act to procedural functions of the Commission, and I shall discuss these as I go along in describing to you the method by which cases are handled.

COMMISSION PRACTICE

With relation to practice, I suppose you will be interested in knowing just who may appear before the Commission. Any party to a proceeding may appear for himself, or may be represented by an attorney at law who has been admitted to practice before the Supreme Court of the United States, or the highest court of any State or Territory or of the District of Columbia.

No register of attorneys is maintained, nor is formal application for admission to practice required. A written notice of appearance on behalf of a specific party in the particular proceeding should be submitted by attorneys desiring to appear before the Commission, and such notice should contain a statement that the attorney is eligible under the rule. Any attorney practicing before the Commission, or desiring to practice, may be disbarred or suspended for good cause shown, but only after he has been afforded an opportunity to be heard in the matter.

Perhaps the clearest exposition of practice before the Federal Trade Commission can be obtained from a description of the actual manner and method by which cases are handled.

Bear in mind that the Commission is not required to wait until a method of competition has been called to its attention by some injured competitor or member of the public. While a large proportion of its cases do originate through such informal complaints, investigations are initiated by the Commission on its own motion. Where the Commission's attention is called to an alleged violation of one of the laws committed to its jurisdiction, the matter may be handled in one of several ways. If the evidence of violation submitted in application for complaint is fairly clear, the matter is assigned for such field investigation as is necessary to ascertain the facts in a preliminary way. This usually involves interviewing both the applicant for complaint and the party complained about. In this connection investigations conducted by the Commission prior to formal action are confidential, and no publicity is given to the fact that such an investigation has even been initiated before a stipulation is accepted from or a formal complaint is served upon a respondent. The Commission's examining attorney upon completion of his investigation summarizes the evidence in a report, reviews the law, and recommends the action he considers appropriate for the Commission. The record is then reviewed by the Chief Examiner and, if in his opinion no further investigation is necessary, is submitted to the Commission with his conclusions and recommendations.

The Special Board of Investigation was created in 1929 as a separate division for handling false and misleading advertising matter

as published in newspapers and in magazines and as broadcast over the radio. In 1938 this branch of the Commission was reorganized and its name changed to Radio and Periodical Division. Attorneys for this Division review advertising in nearly every magazine of interstate circulation, current issues of hundreds of newspapers, and approximately a million pages per year of advertising continuity broadcast on the radio. Advertising matter from these sources which is considered by the Division to be false or misleading is made the subject of preliminary inquiry, usually by correspondence. It is possible in this way to contact hundreds of advertisers each year. The procedure of the Division is rather informal, and advertisers may appear for conferences before it and submit evidence to explain or justify representations which on their face appear misleading.

Stipulation procedure.—To proceed formally by issuing complaints and trying all cases involving unfair practices would require a greatly augmented staff and much larger expenditures. Since most businessmen are willing on notice to modify or abandon unfair practices, the Commission usually affords them the opportunity of executing what is known as a stipulation. These stipulations set out the facts and the agreement of parties executing them to cease and desist from unfair practices in the future. The Commission's policy is against allowing any respondent to stipulate when the practice involved is tinged with fraud or where there is a restraint of trade prejudicial to the public. Stipulations are also denied parties respondent who cannot give satisfactory assurance to the Commission that the stipulation will be adhered to.

Stipulations are negotiated directly with advertisers by the Radio and Periodical Division in matters handled by it, and by the chief trial examiner in other cases.

Complaints and answers.—In the event a proposed respondent rejects the privilege of stipulation and wishes to contest the matter, where the stipulation procedure is not appropriate, or where a prior stipulation has been violated, the Commission issues its formal complaint setting out the facts as indicated by its investigation and charging the respondent with a violation of the law.

The Commission's Rules of Practice provide that an answer shall be filed by the respondent within 20 days of service of the complaint. In the event a respondent desires to admit all material allegations he may do so without forfeiting his right to urge that the facts do not constitute a violation of law.

Hearings.—Where no answer is filed or where the answer raises any issue of fact, the matter is set down for the taking of testimony before a trial examiner, to conduct hearings at convenient places throughout the country. Hearings before trial examiners bear much resemblance to ordinary equity procedure. All testimony is stenographically reported and witnesses and exhibits may be introduced both by the trial attorney for the Commission and by respondent's attorney.

I suppose that you will be particularly interested in this stage of the proceeding. Much has been said recently on the subject of applicability of the rules of evidence to such hearings before administrative tribunals. Several formal rules have been adopted by the Commission relating to evidence in a hearing before a trial examiner. They are contained in the Commission's Rules of Practice.

I suppose that the best way of stating the Commission's policy with reference to the rules of evidence would be to say that it requires as close adherence to them as possible. Of course, many of the common law rules of evidence which were designed to protect lay juries from irrelevant material are not applicable to a Commission which is designed to be expert in its particular field. Both the trial examiners and the Commissioners have a special and expert knowledge of the questions involved in these cases and are much more able to sift the wheat from the chaff. Thus, while it is our policy to preserve all the essentials of a fair hearing no slavish adherence to the rules of evidence as such is required. Then too, some respondents are not represented by counsel, and requirements of technical rules would place them under considerable hardship.

It is the Commission's practice upon seasonable motion and proper showing to permit appeals to the Commission from rulings of the trial examiners on admissibility of evidence or other procedural matters. Where essential, the Commission may hold a hearing on such appeals during the course of trial of the case; in other instances, the Commission hears the appeal at the time of final argument on the merits.

Trial examiner's reports, exceptions, briefs, and arguments.—After evidence has been presented by both sides to the proceeding, the trial examiner who has heard the matter prepares a report setting forth the evidentiary facts elicited in the hearing together with his conclusions of fact and of law and his recommendation as to action to be taken by the Commission. This report is sent with the entire record to the Commission and a copy is served on counsel for respondent and upon the Commission's trial attorney. Exceptions may be taken to the trial examiner's report by either attorney. Briefs are then in order to be filed, and if the respondent desires, final oral argument may be had before the Commission sitting en banc.

Commission's decisions.—Following this the Commission makes its final decision on the basis of the entire record and the briefs and oral arguments. This decision may be either to dismiss the complaint—sometimes without prejudice—or it may be to issue an order directing the respondent to cease and desist from such of its practices as are found to violate the law. In the event the Commission decides to issue an order to cease and desist it prepares and publishes, along with its order, its findings as to the facts, setting out the facts as found by the Commission from the public record.

Right at this point I should like to call your attention to the fact that these findings are made on the basis of the public record. Before a complaint is issued a record is built up consisting of interview reports and exhibits secured in a preliminary investigation. This preliminary record is confidential and never published. Facts relied upon by the Commission in issuing its complaint, and which are contained in the preliminary record, may not be relied upon in preparing findings of fact unless they have also been established in the public record. And to protect parties investigated by the Commission from indiscriminate use of information gained in preliminary investigation criminal penalties are provided for unauthorized disclosure of such information by Commission employees.

JUDICIAL REVIEW AND ENFORCEMENT OF ORDERS

Under the Federal Trade Commission Act before its recent amendment, a Commission order could reach the courts in one of two ways: The respondent had a right to petition any of the circuit courts of appeal of the United States for review of the Commission's order, and the court was empowered to affirm, set aside, or modify the order of the Commission, the Commission's findings as to the facts, if supported by testimony, to be conclusive on the court.

In the event a respondent did not file an appeal and continued to engage in the practice in violation of the order, the Commission's only method of enforcement was to apply to one of the United States circuit courts of appeals for a decree affirming the order and directing compliance therewith. The court in such a proceeding, of course, had the power to modify or set aside the Commission's order, but if it affirmed it and directed compliance, any subsequent violation was punishable as for contempt of court.

The Wheeler-Lea amendments to the Federal Trade Commission Act provided a time limit upon appeals and an important additional enforcement procedure. In the event no appeal is made to the United States Circuit Court of Appeals within 60 days a cease-and-desist order becomes final automatically. Each subsequent violation of an order which has become final either through affirmance or failure to appeal within 60 days subjects a respondent to a civil penalty of not more than \$5,000, recoverable in any of the district courts of the United States upon application of the Attorney General. In the event of an appeal within the 60-day period, the court may review, modify, set aside or affirm the Commission's orders, and the Commission, no doubt, may still seek enforcement through the contempt process of a United States Circuit Court of Appeals whose decree directing compliance with a Commission order is violated.

TRADE PRACTICE CONFERENCES

One of the most important functions of the Commission is accomplished through its trade practice conferences.

An ideal visualized by President Wilson in the creation of the Federal Trade Commission was that it was—

a means of inquiry and of accommodation in the field of commerce which ought to both coordinate the enterprises of our traders and manufacturers and to remove the barriers of misunderstanding and of a too technical interpretation of the law—

and he stated that the Commission had been created with—

powers of guidance and accommodation which have relieved businessmen of unfounded fears and set them upon the road of helpful and confident enterprise.

It is through its trade practice conference procedure that the Commission is able to furnish to business and industrial groups the "guidance and accommodation" which President Wilson had in mind.

Any industry or important group within an industry may have a trade practice conference if it appears to the Commission that it is desired by a substantial majority of members of the industry, and that

there are prevalent in the industry practices which are prejudicial to the best interests of the industry as a whole and inimical to the public. Due and proper notice is given so that every member of an industry may have opportunity to be present and participate in such a conference.

It is obvious that all industry cannot be poured into one mold. Hence, the members of an industry, with the aid and counsel of the Commission's staff, consider their peculiar problems, and such trade practice rules as fit the need of the industry are formulated. If within the law and otherwise acceptable, they are approved and promulgated by the Commission.

There are many advantages in the trade practice conference procedure and trade practice rules. For one thing, the Commission's jurisdiction under section 5 is contained in a broad grant which has been interpreted by the Commission and the courts to apply to a variety of situations. The ordinary businessman, and for that matter the practitioner at the bar, has no way of determining the extent to which the Commission's jurisdiction affects a particular industry, without research into Commission and court decisions. Group I rules codify and clarify the requirements of the broad language of section 5, and in such a way as to make them specifically applicable to a particular industry. Thus, for instance, in the trade practice rules for the rayon industry, provisions are contained requiring, to avoid deception of the public, positive identification of the different fibers in textiles and making it clear that an advertiser of mixed goods must, in describing such textiles, name the constituent fibers in the order of their predominance by weight, i. e., rayon, silk, and cotton, for a product containing 50 percent rayon, 30 percent silk, and 20 percent cotton.

The fact that the trade practice conference procedure permits of wholesale and simultaneous abandonment of unfair practices is one of its greatest advantages. Often the Commission will find on investigating an unfair practice engaged in by a single concern that a number of its competitors are likewise engaged. Usually in such situations offenders are only too glad to abandon the practice if some assurance can be given that competitors will also be bound to cease; thus, if the Commission institutes formal proceedings against one concern engaged in an unfair practice, others so engaged may derive a competitive advantage unless proceedings can be instituted against them at the same time. When a trade practice conference is held in such an industry, all those engaged in unfair practices may voluntarily abandon them at the same time and without the necessity of numerous formal cases.

In so-called group II rules, the Commission receives and publishes expressions of industry policy encouraging even more ethical practices than the law requires. While violation of group II rules is not ordinarily an infraction of the law, the fact that a substantial majority of members of an industry or business sit down together and agree among themselves to adopt such a policy has a moral weight almost as forceful as that of the law itself. A typical group II rule is that adopted in the trade practice rules for the rayon industry, which sets out that it is considered a desirable practice for sellers to give consumers information in advertising and labels on the best method of cleansing, caring for, and using the particular fabric.

GENERAL AND SPECIAL INVESTIGATIONS

Certain other important powers are granted to the Commission in section 6 and 7 of the act. Under section 6 (a) the Commission is granted power to gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the act to regulate commerce and its relation to other corporations and to individuals, conduct of business in accordance with the law. It is also empowered the Commission to require annual or special reports from any corporations engaged in commerce; and, upon the direction of the President or of either House of Congress, to investigate and report the facts relating to any alleged violation of the antitrust acts by any corporation. It is also empowered, upon application of the Attorney General, or upon its own initiative, to investigate the manner in which any final decree against any defendant corporation in a suit brought by the United States to prevent and restrain a violation of the antitrust acts, is carried out. The Commission may also, upon the application of the Attorney General, investigate and make recommendations for the readjustment or reorganization of any corporation alleged to be violating the antitrust acts, in order that the corporation may thereafter maintain its organization, management, and conduct of business in accordance with the law. It is also empowered to investigate from time to time foreign trade and to make such reports to Congress as it deems advisable.

Section 7 of the act provides that when a suit in equity is brought by or under the direction of the Attorney General as provided in the antitrust acts, the court may, if it is of the opinion that the complainant is entitled to relief at the conclusion of the testimony, refer the suit to the Commission as a master in chancery, to report an appropriate form of decree.

Under the general power to investigate, the Commission has completed a number of broad and general economic surveys of great importance. Probably its largest job in this respect was the investigation into the public utility field, which contributed in no small measure to the passage of the Public Utility Act of 1935, and resulted in the reduction of many utility rates in the various States.

NATURE OF COMMISSION'S POWERS AND FUNCTIONS

A very clear and concise statement from a legal viewpoint, of the nature of the Commission's functions, is contained in *Rathbun v. United States*,⁴ where the court said:

The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid. Such a body cannot in any proper sense be characterized as an arm or an eye of the executive. Its duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control. In administering the provisions of the statute in respect of 'unfair methods of competition'—that is to say in filling in and administering the details embodied by that general standard—the commission acts in part quasi-legislatively and in part quasi-judicially. In making

⁴ 295 U. S. 602, 55 Sup. Ct. 869, 79 L. ed. 1611 (1935).

investigations and reports thereon for the information of Congress under § 6, in aid of the legislative power, it acts as a legislative agency. Under § 7, which authorizes the commission to act as a master in chancery under rules prescribed by the court, it acts as an agency of the judiciary. To the extent that it exercises any executive function—as distinguished from executive power in the constitutional sense—it does so in the discharge and effectuation of its quasi-legislative or quasi-judicial powers, or as an agency of the legislative or judicial departments of the government.

It is perhaps this mixture of the types of functions described by the Court in the Rathbun case that has most perplexed members of the bar confronted with problems of practice before administrative agencies. The mixture of functions in the Federal Trade Commission was not created inadvisedly. On the contrary, it was considered necessary by the Congress in order to allow the Commission to reach effectively the objectives of the basic legislation and the problems toward the solution of which the antitrust laws are directed. As you who are familiar with the legislative history of the antitrust laws will recognize, various different approaches to the solution of the problem were suggested. The Bureau of Corporations, for instance, which was the Commission's immediate predecessor, was established in 1903 with the power to gather, compile, and publish reports concerning business practices, on the theory that adequate publicity would so activate public opinion as to make it expedient for those engaged in undesirable practices to abandon them. Another approach is expressed in the Sherman Act, which places largely in the courts the power of preventing combinations and monopolies in restraint of trade. Still another approach is expressed in the Clayton Act which proscribes certain specified and enumerated practices. The Federal Trade Commission as finally constituted embodied something of all these approaches but with the addition of the power to implement a broad standard by rule, regulation, or order, either generally or in specific cases, and to act as an arm of the Congress in defining and proscribing unfair methods of competition which might not be specifically covered by the other legislation.

CONCLUSION

Bearing in mind these broad objectives, I am sure you will see that what might appear to be a departure from the traditional constitutional division of powers between strictly legislative, judicial, and executive agencies was both necessary and desirable.

Criticism has at times been advanced to the combination in administrative agencies of the functions of "judge, jury, and prosecutor." Specifically this charge was made against the Federal Trade Commission in some of the earlier literature.

However, the analogy of "judge, jury, and prosecutor" applied to procedure before the Commission is not apt. The Commission has no power to punish or inflict penalties. If penalties or punishment are exacted from a party to a Commission proceeding, it must be by a court of law in the usual manner. Nor has the Commission any power to enforce its orders—this must be effected through a court of law. Nor can the Commission issue any cease-and-desist order which is not subject to review in a court of law as provided in the statute.

The power of the Commission to initiate proceedings on its own motion is highly important to the objectives of the act. In fact, this power represents one of the principal departures from the common law method of dealing with the situations which are within the Commission's jurisdiction. This was recognized by the Congress at the time and has been referred to since passage of the act by the courts as one of the impelling reasons for the legislation. Under the common-law doctrines of unfair competition, fraud and deceit, restraint of trade and monopoly, the courts could only act when a justiciable controversy was presented to them by a party having sufficient interest to maintain a suit. Thus a voluntary agreement among manufacturers to fix prices might never reach the courts unless one of the parties to the agreement brought suit, either to enforce the agreement against one who had breached it or because of special injury from its operation. And the public, which might be most seriously injured by such an agreement, would have no protection unless one or more of the chief beneficiaries of the agreement brought it to court.

A more specific illustration of the advantage in having an agency with the power to institute a case involving unfair competition on the basis of the public interest is contained in *American Washboard Company v. Suginaw Manufacturing Company*.⁵ The American Washboard Co., a manufacturer of genuine aluminum-faced boards, brought suit to restrain use by a competitor of the word "aluminum" on a washboard which did not contain any of that metal. Judges Taft, Lurton, and Day, each of whom later served upon the Supreme Court of the United States, held that the facts as shown did not entitle the complainant to relief. In the course of his opinion, Judge Day said:

Can it be that a dealer who should make such articles only of pure wool could invoke the equitable jurisdiction of the courts to suppress the trade and business of all persons whose goods may deceive the public? We find no such authority in the books, and are clear in the opinion that, if the doctrine is to be thus extended, and all persons compelled to deal solely in goods which are exactly what they are represented to be, the remedy must come from the legislature, and not from the courts.

In commenting upon the decision in the Washboard case, the court in *Royal Baking Powder Co. v. Federal Trade Commission*⁶ stated:

The above case illustrates one of the reasons which led Congress to enact the statute creating the Federal Trade Commission and making unfair methods of competition unlawful and empowering the Commission to put an end to them. By that statute the identical situation which the court in the above case said it was beyond its power to suppress has been brought within the jurisdiction of the Federal Trade Commission—created to redress unfair methods of competition. Before the enactment of the Federal Trade Commission Act the courts appear to have had jurisdiction of an action for unfair competition only when a property right of the complainant had been invaded. But the Federal Trade Commission Act gave authority to the Commission itself when it had reason to believe that any person, partnership, or corporation was using any unfair method of competition in commerce, if it appeared to it that a proceeding by it in respect thereof "would be to the interest of the public," to bring such offending party before it to answer to its complaint and after a hearing could, upon good cause shown, require it to cease and desist from its unlawful methods.

⁵ 103 Fed. 281 (C. C. A. 6th, 1900).

⁶ 281 Fed. 744 (C. C. A. 2d., 1922).

And in *Armstrong Cork Company v. Ringwalt Linoleum Works*,⁷ the Circuit Court of Appeals for the Third Circuit, in an action by a manufacturer of linoleum to restrain misrepresentation by a competitor, specifically suggested, in view of the Washboard case, that this type of action would probably be one for the jurisdiction of a body such as the Federal Trade Commission. It practically invited the complainant to call the Commission's attention to the practice. This suggestion of the court was followed, and through a cease and desist order of the Commission the misrepresentation was ended.

As indicated in these decisions, the Commission's right to initiate proceedings on its own motion is very important. It has never been questioned by the courts, and on the contrary it has been referred to in judicial opinion as an improvement over the common law.

While the Commission exercises certain functions which are quasi-judicial, and some which are similar to a prosecution at law, they are but parts of a general machinery designated as a whole to protect commerce and the public, and to prevent rather than to punish unfair practices. As President Roosevelt said in 1937 on the occasion of his laying the cornerstone of the Commission's building—

The vision of Woodrow Wilson has been vindicated again. When that far-seeing statesman asked Congress in January 1914 to create the Federal Trade Commission he saw in the realm of trade and commerce a field in which prevention was indeed better than punishment.

Prevention of unfair business practices is generally better than punishment administered after the fact of infringements costly to the consuming public and to honest competitors.

MR. DAVIS. When I get my statement back and catch up with what we have said and what we have not, I understand that I have the privilege of making an extension.

I might want to do that in some particulars, although not very much.

MR. SADOWSKI. That has been granted you.

MR. DAVIS. While the Commission naturally has a good many "brickbats" thrown at it, such as those at these hearings, yet it receives a great many more bouquets. Under the permission granted, I am herewith presenting for insertion in the record a very few of the hundreds of bouquets:

Extension of remarks of Hon. Harry S. Truman on the Federal Trade Commission, a recapitulation of the Wheeler-Lea amendment to the Federal Trade Commission Act, in the Senate of the United States, June 2, 1938.

Letter from Mr. Frederick D. Ferris.

Letter from Mr. Edward Taylor.

Editorial in Advertising and Selling, March 1940.

Article by the Institute of Consumer Facts of the Pacific Advertising Association, in cooperation with the American Association of Advertising Agencies.

Article in New York Post quoting and commenting upon an address by Paul G. Hoffman, president of the Studebaker Corp.

Editorial from The Bedding Manufacturer.

(The matter referred to is as follows:)

⁷ 240 Fed. 1022 (C. C. A. 3d., 1917).

[Congressional Record Appendix, 75th Cong., 3d sess., vol. 83, pt. 11, p. 2322]

THE FEDERAL TRADE COMMISSION

EXTENSION OF REMARKS OF HON. HARRY S. TRUMAN, OF MISSOURI, IN THE SENATE OF THE UNITED STATES, THURSDAY, JUNE 2 (LEGISLATIVE DAY OF WEDNESDAY, APRIL 20), 1938

A RECAPITULATION OF THE WHEELER-LEA AMENDMENT TO THE FEDERAL TRADE ACT

Mr. TRUMAN. Mr. President, I ask unanimous consent to have inserted in the appendix to the Record a recapitulation of the Wheeler-Lea amendment to the Federal Trade Act, and some of the orders of the Federal Trade Commission and their effect on the public welfare, and also some of the functions of the Commission under the Clayton Act.

There being no objection, the statement was ordered to be printed in the Record, as follows:

"The Federal Trade Commission Act, passed nearly a quarter of a century ago, had not been amended until the present session of Congress. Congress passed, and on March 21, last, the President approved, certain amendments embodied in what is generally known as the Wheeler-Lea Act, designed, in the interest of the using and consuming public, to relieve the Commission from the expenditure of time and money necessary to prove competition, where it appears that unfair or deceptive acts or practices have been engaged in. Other provisions of the amending act definitely determine when the Commission's orders to cease and desist become final and establish penalties for their violation thereafter. To better protect the public, more severe penalties are provided for the false advertising of those commodities, the use of which may be injurious to health.

"Enforcing the provisions of the Federal Trade Commission Act is only one of the functions of the Commission. It has jurisdiction also over certain sections of the Clayton Antitrust Act, including an amendment to section 2 of that act, generally referred to as the Robinson-Patman Antiprice Discrimination Act; it administers the Webb-Pomerene Export Trade Act, and is empowered to make investigations at the request of the President, the Congress, the Attorney General, or upon its own initiative.

"The Robinson-Patman Act, generally speaking, is directed toward the prohibition of unjustified price discriminations which tend to injure competition or promote monopoly and the elimination of certain unfair trade practices, involving price discriminations, which were considered by Congress to be inherently injurious to competition. Since the effective date of the act, June 19, 1936, the Commission has conducted approximately 500 investigations under this act and has issued 43 formal complaints and entered 16 orders to cease and desist. In most of the cases investigated the members of the industries concerned voluntarily changed their methods of doing business so as to conform to the provisions of this law, making unnecessary any further proceedings by the Commission. Four proceedings which had gone to complaint were dismissed after hearing.

"Respondents in three cases have appealed from Commission orders directing them to cease and desist from violation of the brokerage section of the act. In the only one of these proceedings in which court action has, as yet, been taken, the Commission's order to cease and desist was, on May 2, 1938, affirmed by the United States Circuit Court of Appeals for the Second Circuit in New York.

"A total of 308 complaints, covering all types of cases, was issued by the Commission during the year beginning June 1, 1937. In the same period, the Commission entered 256 orders to cease and desist, and 568 cases were settled by stipulation. The stipulation method of disposing of a case affords the respondent the privilege of signing a statement of fact and an agreement to discontinue the unfair methods of competition alleged.

"Since March 4, 1933, the Commission's orders to cease and desist have been affirmed in the several circuit courts of appeals of the United States in 54 of 57 cases. The three adverse decisions were subsequently set aside by the Supreme Court, and the Supreme Court, in the only case in which it has set aside an order to cease and desist of the Commission during the past 7 years did so by a 5 to 4 decision, which reversed a prior favorable decision by the circuit court of appeals.

"In its two most recent cases before the Supreme Court, decided at the present term, the Commission's action has been approved. In the Standard Education Society case the Court unanimously affirmed the Commission's order directed

against the misleading advertising of reference books; while in the Goodyear Tire & Rubber case, involving price discrimination among purchasers of tires, the Supreme Court reversed a prior decision by the circuit court of appeals holding the controversy between the Commission and the company to be moot, and has remanded the case for determination on the merits.

"During the past 2 years the Commission has issued a number of cease-and-desist orders in cases directed against price fixing and other combinations in restraint of trade. Important cases included in proceedings of this character have involved the following commodities: Building materials and builders' supplies, butter tubs, canned and dried foods, clothing, electrical equipment, furniture, groceries, rayon yarn, rice, school supplies, surgical instruments, and tin plate.

"Important cases of the same character now in course of trial before the Commission involve automobile parts and accessories, cement, optical goods, steel office furniture and equipment, and wooden containers for fruits and vegetables.

"In December 1937 trial of a highly important case, involving the validity of the so-called multiple basing point system, was begun. It is a proceeding against approximately 75 manufacturers of cement, charged with entering into an unlawful combination to eliminate price competition, resulting in increased prices for cement. Testimony is still being taken in this case.

"The Commission conducts trade-practice conferences, in which industries or trade groups are afforded opportunity for voluntary participation in the establishment, subject to the Commission's approval, of trade-practice rules for the elimination or prevention of unfair methods of competition and other illegal practices or trade abuses.

"Trade-practice rules for the following industries have been promulgated by the Commission since June 1, 1937: Concrete burial vault manufacturers, house dress and wash frock manufacturing industry, popular, priced dress manufacturers, toilet brush manufacturers, metal-clad door manufacturing industry, rayon industry, wholesale jewelers, and carbon-dioxide manufacturers.

"Rules have been proposed, and are now before the Commission for consideration, for the following industries: Radio receiving set manufacturers, perfume and cosmetic manufacturers, wood-cased lead pencil manufacturers, tomato paste manufacturers, oleomargarine manufacturers, macaroni manufacturers, fur industry, silk, wool, hosiery, ribbon, and linen industries, wholesale stationery industry, paint and varnish brush manufacturers, automobile industry, infants' and children's knitted outerwear industry, baby chick industry, inoculant industry, and putty manufacturing industry. Trade practice conferences for a number of other industries are also under consideration.

"More than 100 general investigations have been made by the Commission, most of which were under resolutions of Congress or at the request of the President.

"The Commission's final report of its investigation of agricultural income and also its report on grapes, fresh fruits, and vegetables, and the first part of its report on its farm implements and machinery inquiry were submitted to the Congress during the present fiscal year.

"On May 1, 1938, acting under a congressional resolution, the Commission began an investigation of the automobile industry. This inquiry will cover policies employed by manufacturers in distributing motor vehicles, accessories, and parts, and the policies of dealers in selling motor vehicles at retail, to the extent that such policies affect the public interest.

"The Commission recently occupied for the first time in its history a permanent public building, the construction of which was begun during the present administration. President Roosevelt, in laying the cornerstone of this building last summer, said that the Commission's 'record of accomplishments in the interest of fair competition, in prosperous times and when evil days were upon the land, warrants that this body shall have a habitation adequate to its needs and in keeping with the importance of the tasks which it has accomplished and will continue to perform in the protection of American trade.'

"The President further stated that the 'dangers to the country growing out of unfair methods of competition still exist,' and that they make the work of the Commission of vital importance in the country's economic life."

ADVERTISING

STEWART, HANFORD & CASLER, INC.,
Rochester, N. Y., February 17, 1940.

CHAIRMAN, FEDERAL TRADE COMMISSION,
Washington, D. C.

DEAR SIR: If agreeable to your organization, I would appreciate being put upon your mailing list, in order that I may receive releases of the frequent reports of the findings and activities of your body.

As a firm believer of the usage of truth in advertising, I most certainly want to compliment your organization for the very worth-while service you are daily rendering modern business.

Sincerely yours,

FREDERICK D. FERRIS.

THE HART MANUFACTURING CO.,
Hartford, Conn., February 19, 1940.

Hon. EWIN L. DAVIS,
Chairman, Federal Trade Commission,
Washington, D. C.

DEAR SIR: We thank you very much for sending to us a copy of your release for the month of December 1939.

We think that your Commission is doing very valuable work in exposing fraudulent advertising and having it stopped. We hope that you will continue your valuable contribution to the welfare of the American people in the work you are doing.

Yours very truly,

EDWARD TAYLOR.

[From *Advestising and Selling*, a journal of source ideas and discussion for those engaged in advertising and marketing]

EDITORIAL

WHY HYSTERICS OVER THE FTC?

One of the FTC's standing assignments is to make economic studies for the President and Congress. Last fortnight, it was voted \$88,829 to investigate the subject, *Methods and Cost of Distribution*; this would include the cost and service of national advertising. It is obviously a pertinent topic of wide public interest. Since things still unknown about the distribution of goods could fill a library, any new data turned up by the FTC should be more than welcome.

So we were a little sorry to see how news of the study seized spokesmen in the field with hysterics. Our senior in the field, *Printer's Ink*, referred to the investigation as an "inquisition"—in its news columns. Editorially, it beat the war drums with: "Advertisers may as well make up their minds that at last they are up against the real thing and prepare for the fight of their lives * * * And now the firing has started. It will probably be a long and bitter war * * * It looks as if general mobilization should be the order of the day."

If this were practice copy for war posters against the Madagascans, it might not leave us quite so stone cold. Because, we are convinced, that instead of girding loins "for the fight of their lives," advertisers should use the time to turn out more and still more efficient advertising.

Why all the war whoops? The "hostile attitude" of the Commission toward advertising is cited. But is it so hostile? Congressman Barton, while inveighing against inner New Dealers, recently stated: "I do not accuse the Federal Trade Commissioners themselves of being antiadvertising or antibusiness." (And it is the Commissioners, not smart underlings, who would have to O. K. a crusade against advertising.) John Benson, Four-A president, has found FTC administration of the Wheeler-Lea Act on the whole constructive and reasonable. A profile by a writer close to the Commission, who didn't pull his punches, summed up: "Not a single member harbors radical ideas about the social aspects of advertising." (February issue.)

There's too strong a tendency to expect the Commission to be a sort of booster club for advertising, being very mousey about its deficiencies, and roundly lauda-

tory about its services. That's not the Commission's job. It's an extramural organization charged, among other things, with upholding standards of advertising truthfulness and making economic studies. The field and companies in the field should expect it to say things about them which they won't like. The Commission should be free and have the courage to go after the big as well as the little names when it feels empowered under the law to do so. And both from an immediate and a long-term view it's a good guess that an active, rather than a lax, performance of FTC's job will do advertising a lot more good. If in doubt, see how the FTC is chastening copywriters who give their advertisements a flavor of "baloney" (Check List of FTC Taboos, p. 31).

In the same way, we don't need to raise barricades against an extramural study of advertising and distribution. If it's bolshevistically conducted, Red evidence will doom the study to the ashean.

We're concerned about all the shooting, because advertising spokesmen go in far too much for self-justification and apology. Too large a percentage of manuscripts that come to our office, and too many articles published in the advertising press use up paper by telling advertisers' reasons for not being ashamed of their business. The subject is worked pretty threadbare in advertising oratory. Rationales and triggerlike reflexes of outrage over criticism suggest a guilt neurosis that ought to be discouraged. There's nothing collectively to be guilty about, and there's nothing cataclysmic going to happen. Last year, when consumers reached a peak of expression and when Wheeler-Lea was functioning full time, advertising volume went up, over 1938, 9.12 percent for magazines, 2.23 percent for newspapers, and 15.87 for radio.

Sorry, but we just can't see the FTC study landscaping Madison Avenue back into a cowpath. We think that advertising can take it.

(The Institute of Consumer Facts of the Pacific Advertising Association, in cooperation with the American Association of Advertising Agencies)

[From the Family Circle]

YOU'VE A REAL FRIEND IN THE FEDERAL TRADE COMMISSION—ITS VIGILANCE IS JUST ANOTHER REASON WHY YOU CAN DEPEND UPON ADVERTISING AS AN IDEAL BUYING GUIDE

In Washington there is a body of five men known as the Federal Trade Commission.

They supervise the reading of advertisements and radio commercials which run in the United States.

Their object is to protect you, the consumer, from a small minority of businessmen who may not be using advertising in your interest.

Their function is just the same as the police force which protects your community from the small minority who do not stay within the law.

When the Federal Trade Commission finds an ad which looks suspicious it investigates fully, and if anything is out of line, cracks down.

Organized advertising is solidly behind the Federal Trade Commission because it knows that 99 percent of advertising is ethical, constructive, and in the consumers' interest.

Organized advertising is just as anxious as you are that people who advertise unethically be brought into line, because their practices reflect upon the whole profession.

And you'll be glad to know that the Commission finds a comparatively small number of ads upon which action is taken, although each year hundreds of thousands of advertisements pass under the Commission's scrutiny.

WHAT TO DO

With this protection of the Federal Trade Commission plus the voluntary censorship of advertising itself, you more than ever can make advertising your daily buying guide.

But if you do run across an ad which seems to misrepresent, cut it out and send it to the Federal Trade Commission, Washington, D. C., telling them why you think it's against your interest.

Organized advertising will thank you.

[From the New York Post, Thursday, September 14, 1939]

REACTION HELD WORSE PERIL TO BUSINESS THAN RADICALS—RESTORATION OF OPEN COMPETITION IS VITAL, STUDEBAKER PRESIDENT WARNS

Free enterprise is in greater danger from business reactionaries than Communists, Paul G. Hoffman, president of the Studebaker Corp., said today.

Addressing the annual convention of sales finance companies at the Hotel Pennsylvania, he said businessmen were responsible for much of the regulation that has tended to destroy free competition.

Far too often have segments of organized business fought against honest labeling and made fraudulent advertising claims, he declared, while businessmen who opposed the NRA, "a thorough vicious experiment in the Fascist control of business," were conspicuously few.

GAVE TACIT APPROVAL

Many businessmen, Hoffman said, supported price-fixing legislation and laws to license business and even proposed such laws with the idea of putting some competitors out of business, while the great majority have given tacit consent to these activities by their silence.

"One great agency of the Government is charged with partial responsibility for maintaining open competition and full responsibility for protecting business against unfair competitive attacks," he continued. "I refer to the Federal Trade Commission which, in my opinion, in its long history has been public friend No. 1 of free competitive enterprise.

"Has business recognized this fact and given its vigorous support to the Commission? Unfortunately, the answer is again, 'No.' Minority groups have attacked the Commission unfairly and there has been resentment of its so-called interference with business which has not been justified."

REAL JOB MUST BE DONE

Businessmen, he said, have been "too prone to rush to the defense of those reactionaries who were openly opposing or attempting to sabotage the clear right of the worker to join or not to join a union as he chose and to bargain collectively if he so desired."

"To sum it all up as I see the picture, business has a real job to do if it is to play its part in saving free enterprise and in resisting the worker to join or not to join a feudalism," he concluded. "Those of us who believe in the competitive system must support with all possible vigor every effort of the Government to put competition back into the competitive system."

[From the Bedding Manufacturer for March 1941]

FEDERAL TRADE COMMISSION HAS IMPRESSIVE RECORD

In checking back the fairly recent activities of the Federal Trade Commission where products of this industry have been concerned, even those of us who think chiefly of the Federal Trade Commission as the perfect example of a governmental agency moving with studied deliberation and caution must admit that the record is impressive.

Right off it is important to remember that the bedding industry is down around one hundred five or six in the scale of importance of the country's industries as gaged by annual sales volume and that practically none of a total of 350 industries is exempt from FTC censure now and then for unfair or unlawful practices of one kind or other. This also recalls that the FTC has a multitude of duties in addition to eyeing trade practices.

SOME OFFENSES

Nevertheless the afore-mentioned record shows that many bedding manufacturers have been called to task for such offenses as failing to disclose that a mattress contains used material; for representing, by label or otherwise, that it contains new material when used material is present; for misrepresenting the retail value or price on the label, in advertisements or otherwise; for falsely representing that a mattress has been endorsed or approved by a member of

the medical profession; for using the term "felt" when the fibers have not been garnetted; for using the word "guarantee" without disclosing the nature of the security offered.

Manufacturers of pillows and comforts have also been censured for such offenses as using the term "down" where the article was not composed wholly of down; for falsely advertising or representing the value and for describing an article as "handcrafted" when it was not hand-made or hand-stitched.

These are matters in which a cease-and-desist order has been entered or the offender has signed a stipulation to that effect. There are known to be a great many more similar complaints still pending concerning which, of course, the Commission will release no information until they are disposed of either by cease-and-desist order or by stipulation.

CONFIDENTIAL

So when we consider the vast scope of the Commission's activities and the completeness with which every matter reported to them is investigated we have a better appreciation of their efficiency at least as far as the bedding industry is concerned. They have always guarded closely and kept confidential the source of information reported to them and in the same way have released no information concerning the identity of firms or individuals against whom they were proceeding until the proceedings had terminated.

Naturally the National Association of Bedding Manufacturers is frequently called upon by firms wishing to report others they believed the Commission should proceed against and whenever the evidence clearly shows a continuing violation of fair-trade practices, it has been the Association's policy to file a complaint with the Commission and cooperate with them to bring the matter to conclusion.

Mr. WILLIAMS. I have sat around here for a couple of weeks and I realize the time of the committee is short.

Mr. SADOWSKI. You evidently did not appear when the proponents of the bill were here.

Mr. REECE. He was here at that time, he and two or three others, and did not have an opportunity to appear at that time, and they were authorized to submit their statements, but Mr. Williams felt that he wanted to make his statement.

Mr. WILLIAMS. Owing to the fact that we were here and the other witnesses were out of town, they were given preference.

I was here from the beginning of the hearings.

Mr. SADOWSKI. We will grant you the same privilege that they have to file your statement in the same place in the record where the proponents' names appear, the first part of the record.

Mr. WILLIAMS. That is not possible owing to the fact of the nature of the information that I shall hope to be able to supply the committee. That is not what I hoped to do. I have had direct connection with this legislation and the operations of the Commission for just about 35 years. There have been a number of observations made with respect to it that I think I can clear up in the minds of the committee, and of course, I recognize that the members of the committee will have the record before them, but my experience is such that it is never as satisfactory as to present it in person.

Mr. SADOWSKI. We will stay here a few more minutes and we will hear you.

Mr. REECE. I have a statement by Charles Wesley Dunn, who has been introduced, and I have that here in the form of a letter, and also one by the International Apple Growers' Association and likewise a letter from the secretary and attorney for the Association of the Southern Commissioners of Agriculture.

Mr. SADOWSKI. They will be inserted in the record, and they should appear following the other witnesses that appeared for the proponents of the bill.

Mr. REECE. And, likewise, Mr. Hoge would like to have an extension of his remarks prepared, citing some cases which are not quite ready but which I will hand in.

Mr. SADOWSKI. That permission is granted.

**STATEMENT OF NATHAN BOONE WILLIAMS, 1010 VERMONT
AVENUE, WASHINGTON, D. C.**

Mr. WILLIAMS. I appear on behalf of the Association of American Soap and Glycerine Manufacturers-Producers, Inc., 295 Madison Avenue, New York, N. Y., a membership corporation composed of 193 dues-paying members.

I shall proceed to the observations which I wish to make largely upon my own and upon what I feel to be my own responsibility as a lawyer and in possession of information with respect to this legislation.

In the first place, I want to support vigorously the proposal that the courts should have the right to review decisions of the Commission on the basis of preponderance of evidence.

Thirty years ago I had an experience with the Post Office Department which illustrates what I mean.

A client of mine was publishing letters and instructions to tell people what to eat in order to get the right vitamins for the protection of their health. A citation for fraud order was issued by the Post Office Department and witnesses were called from various and sundry offices, offices of the Government, Government employees who testified that there was no such thing as vitamins. And now you cannot turn on a radio nor look in a drug-store window nor read an advertisement but what you see that. The man was put out of business and a broad order issued against him.

With all due respect to many of the cases that come up of this character, there is a difference of opinion in the higher scientific circles, and certainly the courts ought to be able to review those matters on the basis of the preponderance of the evidence.

Mr. SADOWSKI. At that time, the court itself did not know there were vitamins; probably would not have done much good.

Mr. WILLIAMS. It might not have. That is true. We are supposed to make some progress, however.

The Federal Trade Commission was the first one whereby Congress shirked or at least transferred or went into the idea of using Commissions or establishing administrative bodies to administer particular laws other than those relating to public utilities.

It is the grandfather of all of the brood that we have had since, and what I have to say and what I have to point out with respect to this subject, I wish to assure the committee I do without any consideration of foes to fear or friends to favor.

Woodrow Wilson, writing in the American Lawyer, issue of May 1908, 4 years before he was a candidate and elected to the Presidency of the United States, writing on the subject of trust crusading had this to say:

Governmental control which we are undertaking so extensively and with so light a heart sets up not a reign of law but a reign of discretion and individual judgment on the part of Government officials in the regulation of business, of stock companies owned by innumerable private individuals and supplying the chief investments of thousands of communities. I can see no radical difference

in principle between Government ownership and governmental regulation of discretionary kind. Regulation by commission is not regulation by law, but control according to the discretion of governmental officials. Regulation by law is judicial by fixed and definite rules, whereas regulation by commission as an affair of business sense, of the comprehension and thorough understanding of complex and various bodies of business. There is no logical stopping place between that and the actual conduct of business enterprises by the Government. Such methods of regulation, it may be safely predicted will sooner or later be completely discredited by experience—

and a few more words along the same general line.

It has long been recognized, in fact it was said by Alexis de Tocqueville—

The strength of the courts of law has ever been the greatest security which can be offered to personal independence, but this is more especially the case in democratic ages. Private rights and interests are in constant danger if a judicial power does not grow more extensive and more sound to keep pace with the growing equality of conditions.

That is from Alexis de Tocqueville's *Democracy in America*.

The callow advocates of administrative justice insist that the courts do not properly adjudicate between the myriads of conflicts between citizen and citizen and between government and the citizen. Under our maze of laws with their indiscriminate perplexity maybe this is partially true, but the remedy lies not in the centralization of further power and opportunities for pernicious meddling by such agencies, but in stripping from our laws all nonessentials and in bringing our laws into the confines of those which are necessary and may be observed without detriment to any one.

Laws are worse than useless unless they, within the reasonable understanding and comprehension of the citizen, are adapted to his needs and to modern conditions.

Instead of facilitating the work of our courts of law in the determination of proper issues, we have removed much of such rightful duty and placed it in the care and keeping of administrative agencies of doubtful utility far removed from the watchful eyes of the people.

Under modernized procedure no difficulty would be experienced in keeping the dockets of the courts current.

The ideas expressed in the Magna Carta would be speedily accomplished.

To no one will we deny right or justice. If found necessary, justice would summon the requisite number of qualified lawyers to aid as aids to the court to hear, report upon, and write findings of fact and opinions in particular cases, all subject to exception and review by the courts.

Lawyers are a part of the judicial system. The judges, of course, know the membership of the bar of their respective courts or can readily ascertain their standing and qualification for special duties.

Men familiar with particular branches of the law will be chosen for special tasks in instances where such subjects were involved or in question.

Having discharged their detail of public service they would pass back into the ranks of the bar.

Such opportunities for service would be a constant spur to the ambitious and worthy young lawyer, much more socially valuable than is the oft deferred hope of a political job in a political commission where he is to exercise inexperienced talents and promotes his ambition at constant public expense. In every community there is a wealth of talent now largely unused.

It is true that unquestionably, at least partially, we need some expansion of the authority of the courts in such matters.

It was the hope of some of us, when the Federal Trade Commission law was passed, that it would meet the criticism which had been presented in the debates that went on in Congress with respect to it which, by the way, I may say, that the Federal Trade Commission law as it emerged, in all my 35 years' experience of congressional legislation, presents the most complete and absorbing exercise of the power of a congressional conference committee that I have ever noted.

The bill, as it passed the House, and the bill, as it passed the Senate, was of such character that it was completely rewritten in conference until its author would scarcely recognize it, and that is a matter of record to be determined by your examination of what happened with respect to it.

I was at the time on the staff of the Judiciary Committee of the House and, as I say, it was the hope of some of us that the Federal Trade Commission would do what Lord Mansfield did many centuries ago, specify along the same line that Woodrow Wilson outlined in the article from which I have quoted, the particular instances and the kind and character of unfair methods of competition and define them as experience would develop their instance and their character.

And here we have now so many commissions that the Congress itself would probably have to call in a group of clerks in order to find out how many there are.

Lawyers are confronted in their dealings with such a maze of legislation of this character.

They have no trouble with respect to congressional legislation. The rules and decisions of these commissions, the rules of practice, et cetera, now comprise a dozen volumes or more—20 volumes, I believe. And we have such a complex situation that it is absolutely impossible for the honest lawyer to say what the law is; and we have so far departed from our constitutional division system of legislative, executive, and judicial character, until it is a maze of brambles through which even the bravest may not hope to pass unscathed.

I should like to extend my remarks.

Mr. SADOWSKI. Thank you.

Mr. DAVIS. Before adjourning, upon behalf of the Federal Trade Commission, I wish to express our appreciation for the privilege of appearing before you in these hearings.

Mr. SADOWSKI. We wish to thank you, Judge, for the fine presentation you made here today.

The committee stands adjourned and the hearings are closed.

Mr. REECE. Except for these additional statements.

Mr. SADOWSKI. Except the additional statements that are to appear by those witnesses who could not come personally.

EXTENSION OF THE REMARKS OF JAMES F. HOGE SUBMITTED AT CLOSE OF HEARINGS, MARCH 11, 1946

[From Bartlett's Familiar Quotations, eleventh edition]

No one should be judge in his own cause (p. 988, *Maxim* 545).

It is not permitted to the most equitable of men to be judge in his own cause (p. 1047; *Thoughts*, ch. 4, 1, by Blaise Pascal 1623-62).

EXCERPT FROM A SPEECH, ADMINISTRATIVE AGENCIES AND THE LAW, BY ROSCOE POUND, DEAN EMERITUS OF HARVARD LAW SCHOOL, PRINTED IN WOMEN LAWYERS JOURNAL, SPRING EDITION, 1945

One of the most serious features of administrative adjudication is that administrative agencies act as judges in cases in which they are also prosecutors and so in effect act as judges in their own cases. Many of these agencies entertain complaints, institute investigations upon them, begin what are in effect prosecutions before themselves, allow their own subordinates to act as advocates for the prosecution, and often make the adjudications in conference with those same subordinates (p. 6).

EXCERPTS FROM AN ADDRESS DELIVERED BY UNITED STATES CIRCUIT JUDGE JOHN D. MARTIN, OF TENNESSEE, TO THE JUDICIAL CONFERENCE FOR THE SIXTH CIRCUIT ON OCTOBER 18.

(American Bar Association Journal, December 1945, vol. 31, p. 625)

No more startling innovation has come about within the past decade than the widespread building up of administrative tribunals in derogation of the judicial power, which some of us have thought was firmly vested by the Constitution in the courts alone.

* * * * *

Our practical function in the review of rulings of administrative boards has been reduced to reading records for possible discovery of that rare case wherein there is no evidence, however slight, from which the Board could reasonably have drawn inferences upon which a finding of fact was based. * * *

EXCERPT FROM STATEMENT OF REPRESENTATIVE HATTON W. SUMNERS,
MARCH 9, 1946

Washington bureaucrats can now go to the average citizen with powers and authorities that no king ever possessed. For they make the rules which have the force of law. They construe the rules. They enforce the rules. And no citizen, practically speaking, has the power to resist.

By concentration of governmental power and drafts upon the Federal Treasury, we have now a financially "busted," great, piled-up mass of governmental confusion beyond human comprehension, impossible of democratic control, extravagant, wasteful, inefficient, and by its nature the instrumentality of favoritism tyranny, oppression, and corruption, and the destroyer of the self-reliance and self-respect and governmental capacity of the people, qualities without which no people can remain free.

EXCERPTS FROM A LETTER WRITTEN BY MR. CHIEF JUSTICE D. LAWRENCE GRONER,
FORMER CHIEF JUSTICE OF THE CIRCUIT COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

HON. ROBERT H. JACKSON,
Attorney General of the United States, Washington, D. C.
DEAR MR. ATTORNEY GENERAL:

* * * * *

I shall state my propositions generally and in the briefest possible form.

First: In general, the administrative officer or officers charged with the duty of enforcing a regulatory statute should be separate and distinct from the officer or tribunal charged with the duty of passing judgment upon alleged violations thereof.

* * * * *

Referring back, then, to my first proposition, I think it both correct and fair to say that the whole committee recognizes the plain undesirability of commingling the function of investigation or advocacy with the function of decision. The respective recommendations are nevertheless strikingly inadequate to remove and cure this defect. The majority insist that separation of functions may be

satisfactorily accomplished within the agency itself by creating the office of hearing commissioner with the salary, tenure, and powers proposed. The separate views of three members doubt this and urge complete separation, but in view of the difficulties inherent in such an undertaking, accept temporarily the hearing commissioner plan with the additional provision for slightly greater independence. Thus, in each plan, the commissioner is made a part of and subordinate to the several agencies, and his decision, both on the facts and on the law, is subject to the determination of the agency of which he is a part. The initial findings of fact and the initial decision is his, but the final decision on both the facts and the law is that of the agency, and while his decision may often receive due consideration, the power exists to ignore it and set aside both as to facts and law; and in those cases in which the power is exercised, with no right of a review of the facts anywhere, present unsatisfactory conditions are left wholly unchanged. The controversy, in such circumstances is finally adjudged and determined by the agency which has initiated and conducted the prosecution, and this, I think, is not only wrong but in the teeth of the principle that separation of the legislative, executive, and judicial is an essential condition of liberty.

Judicial review of administrative decisions might be expanded to include a review of the findings in the light of the weight of the evidence, just as a trial judge may set aside a jury's verdict on this ground. The opposition to this plan is generally based on the theory that it would create delay, increase the number of appeals, and clog the court dockets. Experience alone could prove whether this objection has any foundations, but the plan is unquestionably against the present trend of administrative legislation and would provoke the antagonism of many who now oppose any factual review of administrative decisions by the courts. I mention the method only to pass it by.

* * * * *

The correct decision of this question is one of immense importance. It should, in my opinion, be considered by Congress in the light of the real and true purposes which the founders of our Government sought to achieve for themselves and their posterity. These were free action—free enterprise—free competition. They believed that equal justice between man and man and between citizen and State was one of the impartial rewards which encouraged to efforts that produced great and lasting results. Therefore, they made no provision for exemptions from legal duty. What they did provide for was that there should be no oppression, no exaction by tyranny, no spoliation of private right by public authority, and that there should be a fair, honest, effective Government to maintain the things which were thought to be the prerogatives of every individual man.

In the immense expansion of governmental authority, these principles should be the guiding star to a determination of this vexed question.

D. LAWRENCE GRONER.

(Report of the Committee on Administrative Procedure, 77th Cong., 1st sess., Senate Document No. 8, pp. 248-250.) [Italics here added.]

EXCERPT FROM THE REPORT OF THE COMMITTEE ON THE JUDICIARY ON S. 7, SEVENTY-NINTH CONGRESS, FIRST SESSION, NOVEMBER 19, 1945 (S. REPT. No. 752, p. 30)

The "substantial evidence" rule set forth in section 10 (e) is exceedingly important. As a matter of language, substantial evidence would seem to be an adequate expression of law. The difficulty comes about in *the practice of agencies to rely upon (and of courts to tacitly approve) something less—to rely upon suspicion, surmise, implications, or plainly incredible evidence.* It will be the duty of the courts to determine in the final analysis and in the exercise of their independent judgment whether on the whole record the evidence in a given instance is sufficiently substantial to support a finding, conclusion, or other agency action as a matter of law. In the first instance, however, it will be the function of the agency to determine the sufficiency of the evidence upon which it acts—and the proper performance of its public duties will require it to undertake this inquiry in a careful and dispassionate manner. Should these objectives of the bill as worded fail, supplemental legislation will be required. [Italics added.]

(NOTE.—The foregoing refers to the court review section in the McCarran bill and demonstrates clearly the unsatisfactory construction now put by agencies and courts upon the substantial evidence rule. It is in the nature of "giving the

rule another chance" with an admonition that if the agencies and the courts do not do better there will have to be "supplemental legislation.")

JOHN BENE & SONS V. FEDERAL TRADE COMMISSION, 209 FED. 468 (C. C. A. 2, 1924)

The Trade Commission, like many other modern administrative legal experiments, is called upon simultaneously to *enact the roles of complainant, jury, judge, and counsel*. This multiple impersonation is difficult, and the maintenance of fairness perhaps not easy; but we regard the methods pursued¹ in showing Proper's diminution in sales as lacking in every evidential or testimonial element of value, and opposed to that sense of fairness which is almost instinctive (p. 471). [Italics added.]

EXCERPT FROM AN ADDRESS BY GILBERT H. MONTAGUE OF THE NEW YORK BAR BEFORE FORUM OF ADMINISTRATIVE LAW OF THE ESSEX COUNTY BAR ASSOCIATION, NEWARK, N. J., ENTITLED "GETTING ALONG WITH THE GOVERNMENT AGENCIES," APRIL 9, 1945, PRINTED IN THE CONGRESSIONAL RECORD OF MAY 14, 1945

LITIGATING WITH THE GOVERNMENT

Litigation of any kind is a nuisance to a businessman, but litigating with the Government is most wasteful of all in lawyers' fees and executives' time.

As a litigant, the Government has advantages of unique prestige, unrivaled powers of publicity, specially trained legal talent, and inexhaustible resources.

Such Government agencies as the Federal Trade Commission and the National Labor Relations Board have also the advantage that in all their prosecutions they are both prosecutor and judge, and are empowered by statute to make decisions in their own favor, even though such decisions be contrary to the weight of evidence.

EXCERPT FROM A STATEMENT MADE BY JAMES M. LANDIS, DEAN OF THE HARVARD LAW SCHOOL, FORMERLY A MEMBER OF THE FEDERAL TRADE COMMISSION IN A SYMPOSIUM ON ADMINISTRATIVE LAW

(9 American Law School Review 139, p. 183)

When I went to the Federal Trade Commission, I found that the findings of that Commission were, as a matter of practice, drafted by the Commission's attorney in the case, the prosecuting attorney. It seemed to me absolutely wrong that that should be so. True, the Commission exercised an independent judgment before it said, "Issue an order, or do not issue an order," but the findings supporting that order were drafted by the Commission's own attorney who had presented the case. Naturally, he tied up the respondent, so the respondent couldn't move, with the findings he drafted.

EXCERPT FROM THE FEDERAL TRADE COMMISSION (1924) BY GERARD C. HENDERSON, PROFESSOR OF LAW AT YALE UNIVERSITY

In the meantime, however, mention must be made of a surprising practice revealed by an examination of the official dockets in a fairly large number of cases. I have assumed in the previous discussion that the findings were in fact prepared by the examiners who preside at the trials and hear the testimony, but it appears that this is not always the case. In a large number of cases it appears from internal evidence that the findings, at least in the form in which they were finally adopted by the Commission, were dictated by the trial counsel who prosecuted the case, rather than by the examiner who heard it judicially. The findings consist of typewritten sheets, and generally, according to the custom of stenographers, the sheets contain in the upper left-hand corner the initials of the dictator. In the cases of which I have examined the official dockets, I have compared these initials, wherever they appear, with the names of the examiners and trial counsel, or, as the case may be, with the name or initials

¹ By the Federal Trade Commission.

of the counsel who appears to have represented the Commission in the preparation of the stipulation of facts. In 32 cases, where there was no trial, the counsel who dictated or signed the stipulation appears to have dictated the findings. In 10 cases, the counsel who represented the Commission at the trial or argument appears to have dictated the findings. As long as this practice is pursued, it is of course idle to endeavor to preserve the judicial independence of the trial examiner (p. 85).

PROCEDURE OF THE FEDERAL TRADE COMMISSION WITH RESPECT TO THE EXAMINER'S REPORTS AND COMMISSION DECISIONS

REPORT OF THE COMMITTEE ON ADMINISTRATIVE PROCEDURE (P. 442)

Examiners' reports.—The trial examiner's report is served on the attorneys for the Federal Trade Commission and on the respondent or his attorney, but it is considered a confidential document and is not available for public inspection. The typical report begins with a reference to the charges in the complaint; it may be only a brief summary or a several-page synopsis of the allegations. In some reports, the reference to the charges is followed by an outline of the respondent's answer or a statement of the matters admitted by it.

Usually the bulk of the report consists of a narrative statement of the facts found, supported by citations to the transcript and the exhibits. While these citations will often include references under the heading "Contra," thus indicating conflicts in the evidence, the evidence pro and con on each issue is not ordinarily stated. By contrast, some examiners' reports do not present the factual picture in narrative form, but merely summarize separately the testimony of various witnesses, without specific findings as to the ultimate facts in issue. While some of the reports, furthermore, state the specific practices found to have been followed by the respondent and their effect on competitors, others reach only general conclusions in the statutory language.

The conclusions of law which may be drawn from the facts found are nowhere stated, and there is similarly lacking any discussion of the questions of law involved in the case. Finally, the reports do not include any recommendation as to the final disposition of the case nor any indication of the Commission's tentative attitude toward the case in the light of the facts found.

Commission decisions.—Under both the Federal Trade Commission and Clayton Acts, the Commission, if it finds a violation, must issue a report in writing containing findings of fact, and then issue a cease and desist order. The reports and orders, first distributed in mimeographed form, are later printed in bound volumes like those containing decisions of the Board of Tax Appeals or the Interstate Commerce Commission. Unlike the mimeographed copy, which begins with a formal statement of the procedure in the case, the printed version sets out the complaint verbatim and is preceded by headnotes. The bulk of the decision is devoted to numbered "Findings of facts." These are rather formalistically phrased in language, which often resembles that of the complaint; in those cases in which the answer has admitted the allegations of the complaint, the findings merely repeat the complaint verbatim. For the most part, the findings are concerned with ultimate rather than basic facts. The absence of a narrative statement of the basic facts, portraying the history and background of the problem, and the resort to formalistic phraseology sometimes make it impossible to appreciate just what business methods are involved, or what their effect on competitors actually is. Thus, the clear factual picture which is often painted by a decision of the Board of Tax Appeals or the National Labor Relations Board is usually lacking.

* * * * *

In the majority of the contested cases, there is no discussion or even mention of the respondent's defense or justification. As in the case of most agencies, references to the transcript of the hearing are virtually unknown.

The Commission's decisions usually, although not invariably, deal with the legal problems involved as cursorily as they handle the factual side of the case. Decisions containing a reasoned discussion of the principles of law involved are relatively rare, even if not entirely unknown, and although the printed decisions of the Commission now fill 26 volumes, citations of these opinions or of judicial holdings are very uncommon.

In the exceptional case in which the pertinent questions of law involved are discussed, the reasoning will be found in the "Conclusion," which follows the findings of fact. In the typical case, however, the conclusion is merely a brief formalized statement, devoid of reasoning or explanation, characterizing the respondent's conduct in language designed to bring it within the letter of the statute. It may say no more than the following:

The aforesaid acts and practices of the respondent's have been and are to the prejudice of the public and of respondent's competitors and constitute unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

Distinct from the report is the Commission's order to cease and desist, which, after mentioning that the Commission has made findings of fact and concluded that the respondent has violated the act, orders him to abandon conduct specified in numbered paragraphs.

To this point this discussion has dealt only with those cases in which the complaint is upheld, at least in part, and a cease and desist order issued. But in decisions which are "adverse to the complaint," with a few exceptions, there are neither findings of fact nor any statement or discussion at all of the circumstances in which a cease and desist order will not be issued. These decisions are published in the bound volumes of the Commission's decisions under the caption of "Orders of dismissal, or closing case, etc." After listing the name of the respondent and the date and docket number of the complaint, the decision contains a summary, in two or three lines, of the charges, a brief description of the procedure in the matter, and the Commission's order with a terse explanation of the underlying reason. This may consist, for example, of no more than the statement "that the complaint is dismissed for the reason that the testimony and other evidence adduced do not sustain the allegations of the complaint herein."

Jacob Siegel Company v. Federal Trade Commission (the "Alpacuna" case, C. C. A. 3, October Term, 1943, No. 8407)

Excerpts from brief for respondent (Federal Trade Commission) on the petition to review its order, page 50:

"Section 5 of the Federal Trade Commission Act, *inter alia*, states that—'The findings of the Commission as to the facts, if supported by evidence, shall be conclusive' (52 Stat. 113; 15 U. S. C. A., sec. 45 (c)). It is now *Hornbook law* that when the evidence in such matter is in the field of controversy, the weighing thereof is *solely* for the Commission."

* * * * *

Page 51:

"On the record we doubt whether we should have concluded that the 'disparaging' statements were misleading; but," said Judge Learned Hand in *Moretrench Corp. v. Federal Trade Commission* (127 F. 2d 792, 794-795 (1942)), "*since our office ends as soon as we find substantial support for the finding*, this part of the order must also be affirmed," and yet, again, said he, "As this was the only part found to have been false, it is again hard to imagine how anyone reading it could have understood it as more than puffing; yet for the reasons we have just given, if the Commission saw fit to take notice of it, *we may not interfere.*"

Excerpts from brief for respondent on petition for rehearing, page 24:

"Unless the findings and order are *either (a) outside of the line of the evidence or (b) represent abuses of discretion*, there is no power in the courts to disturb such findings and order."

Page 41:

"It is still contended, we repeat, that the Court has *no power* to modify the order in this case."

Page 49:

"In view of the facts and the law, as above presented, it is strongly contended that the Court *has not the power* to 'modify' the order in this case."

[All italics quoted.]

National Harness Mfrs' Ass'n v. Federal Trade Commission, 261 F. 170
(C. C. A. 6, 1919)

Facts.—The Commission issued an order directing the Harness Manufacturers' Association to desist from using certain methods of competition. The association petitioned the court to review and set aside the order and made a motion to dispense with printing the record. This motion was denied and the record having not been printed the Commission moved to dismiss the petition for review.

Statement of the Court.—Page 171: "The statute further provides that the findings of facts by the Commission shall be conclusive, if supported by any evidence. It follows that there will be *no occasion to resort to the record on which the findings were based, unless it is alleged that there was no evidence to support a particular finding, and then it would be necessary to examine only so much of the evidence as pertained to that subject.*" [Italics added.]

John Bene & Sons v. Federal Trade Commission, 299 Fed. 468 (C. C. A. 2, 1924)

Page 469:

"* * * we 'must inquire whether the Commission's findings of fact are supported by evidence,' and this inquiry includes an ascertainment of what kind of evidence, or evidence so-called, the fact findings rest upon. If by evidence is meant testimonial matter legally competent, relevant, pertinent, and material, this record contains very little of that kind."

Harriet Hubbard Ayer, Inc., v. Federal Trade Commission, 15 Fed. (2d) 274
(C. C. A. 2, 1926)

Facts.—The petitioner was engaged in the business of the manufacture and sale of perfume and cosmetics. It mailed out a suggested price list with its orders and refused to sell to customers who engaged in price cutting. The Commission found that they were utilizing cooperative means of accomplishing the maintenance of uniform resale prices.

The Commission's order was reversed, but the Court said (p. 276):

"The rule is now well recognized that the finding of fact by the Commission, *having any evidence to support it*, is conclusive and binding upon the courts, and we may not review the weight of the testimony." [Italics added.]

Indiana Quartered Oak Co. v. Federal Trade Commission, 26 F. (2d) 340, 341,
(C. C. A. 2, 1928)

MANTON, L. HAND, and SWAN, Circuit Judges.

* * * * *

It is now well settled that findings of fact by the Commission, having *any evidence* to support them, are conclusive and binding upon the courts reviewing the weight of the testimony. *Fed. Trade Commission v. Beech-Nut Co.*, 257 U. S. 441, 42 Sup. Ct. 150, 66 L. Ed. 307, 19 A. L. R. 882; *Harriet Hubbard Ayer, Inc., v. Fed. Trade Commission* (C. C. A.) 15 F. (2d) 274, 276; *Oppenheim, Oberndorf & Co. v. Fed. Trade Comm.* (C. C. A.) 5 F. (2d) 574; *Nat. Biscuit Co. v. Fed. Trade Commission* (C. C. A.) 299 F. 733.

* * * * *

SWAN, Circuit Judge.

I reluctantly concur in the result, because the Commission has made findings of deception of the public, *which there is some evidence to support, though in my opinion, it is greatly outweighed by contrary evidence.* The purchasing public knows little, cares less, I think, about the botanical characteristics of mahogany. The Philippine Government, our own Departments of War, Commerce, and Agriculture, and the Interstate Commerce Commission have been accustomed for years to refer to the woods in question as "Philippine mahogany." The National Hardware Lumber Association has, since 1916, established rules for grading "Philippine mahogany." This terms is used in foreign countries also. Combined with the word "Philippine," "mahogany" is used in its commercial, as distinguished from its botanical, sense. Such usage is common in the lumber industry. Witness: Douglas fir or Oregon pine, which is a false hemlock; red cedar, which is a juniper; and many other instances which might be cited. Interference with

such commercial usage does not seem to me justifiable, but in view of the Commission's findings, the court is powerless (p. 342). [All italics added.]

Federal Trade Commission v. Inceto, Inc., 70 Fed. (2) 370 (C. C. A. 2, 1934)

Facts.—The Commission made a motion for leave to present the cause to the court without printing all the evidence heard by the Commission.

Holding of the court.—Motion denied.

"The court will have no occasion to resort to the record on which the findings were based, unless it be asserted by the respondent that the order is not supported by the evidence. *National Harness Mfrs.' Assn. v. F. T. C.*, 261 F. 170 (C. C. A. 6). Upon our review, it will be our duty to ascertain whether such finding is supported by any evidence, if it be challenged. Petitioner asserts that part of the issues of fact tried in this case were determined in favor of the respondent and are no longer in issue; that there will be no occasion to consider any portion of that evidence concerning these issues. The petitioner asks to print only so much of the evidence as it relies upon to support any finding or findings which bear upon the issues to be presented to this court.

"Rule 21, and subdivision 2, of this court, in an application for the enforcement of an order, requires that the transcript of the entire record shall be printed, and unless the parties agree upon printing less, we cannot do otherwise than require all the testimony to be printed as constituting the record for our review." [Italics added.]

Herzfeld et al. v. Federal Trade Commission, 140 Fed. (2d) 207 (C. C. A. 2, 1944)

Facts.—The Commission forbade the use by the petitioner of the word "Mills" as part of their title. They were doing business under the name "Stephen Rug Mills." For 9 years the petitioner had been in the business of importing, distributing, and selling rugs to wholesale and retail dealers. They owned the stock in and controlled mills in the United States, Europe, and China.

Holding of the court.—The Commission's order was affirmed.

Statement of the court.—Pages 208-209:

"It does not follow that the relief granted should extend to an entire suppression of the word, 'Mills'; and, if we thought ourselves free to control the remedy, we might be satisfied to modify the order by merely adding some such suffix as the Supreme Court thought adequate in *Federal Trade Commission v. Royal Milling Co.*, 288 U. S. 212, 218, 53 S. Ct. 335, 77 L. Ed. 706. * * *

* * * the petitioners are near enough to being manufacturers to justify their use of the title as it stands, provided all chance of deception were removed.

"However, since *Federal Trade Commission v. Royal Milling Co. supra*, 288 U. S. 212, 53 S. Ct. 335, 77 L. Ed. 706, was decided, the Supreme Court has as much circumscribed our powers to review the decisions of administrative tribunals in point of remedy, as they have always been circumscribed in the review of facts. Such tribunals possess competence in their special fields which forbids us to disturb the measure of relief which they think necessary. In striking that balance between the conflicting interests involved which the remedy measures, they are for all practical purposes supreme.

* * * "We do not forget that from time immemorial this duty has been entrusted to courts, but that is irrelevant. Congress having now created an organ endowed with the skill which comes of long experience and penetrating study, its conclusions inevitably supersede those of courts, which are not similarly endowed." [Italics added.]

Dearborn Supply Co. v. Federal Trade Commission, 146 Fed. (2d) 5, (C. C. A. 7, 1944)

Facts.—The complaint charged that the petitioner had violated the statute by disseminating false advertisements concerning a cosmetic "Mergolized Wax" in that under certain conditions it may be harmful to the user because of the ingredients of the product. The Commission found that the advertisements contained no reference to precautions and made no reference to directions for use or cautions that the preparation should be used as directed.

Holding of the Court.—The Commission's order was set aside without prejudice to offer additional proof.

Statement of the Court.—Pages 6-7:

"Inasmuch as we are convinced, after a careful study of the record, that *there is no substantial evidence to support the finding* of the Commission upon which its supplemental order is predicated, we find it unnecessary to consider numerous other questions raised by petitioner.

* * * * *

"Admittedly, there is no direct proof in support of this finding, either in the evidence heard at the supplemental hearing or in the stipulation entered into prior to the original hearing. Respondent (the Commission), however, indulges in certain inferences, assumptions, and innuendoes, which it contends furnish the necessary support. The burden of its argument in this respect is that respondent, with petitioner's knowledge, was led to believe that petitioner was making no contention but that its advertisements failed to reveal any precautionary statement, and that under such circumstances it was the duty of petitioner to rebut his assumptions so indulged in by respondent by the introduction of petitioner's complete advertisement. Passing by the proposition that such assumption on the part of respondent, even though acquiesced in by petitioner, should be permitted as a substitute for proof, of which we are doubtful, we are of the view that the record furnishes no basis for saying that there was acquiescence by petitioner. In fact, the circumstances point to a contrary conclusion." [Italics added.]

The Carlay Company v. Federal Trade Commission, decided February 14, 1946, C. C. A. 7, not yet reported

"There is no evidence in this record to support a finding that it is necessary, in order to follow the suggested plan, that the user adhere to a restricted diet. The facts are plain, it being undisputed that eating candy before meals curbs the appetite, lessens intake of food and involves no restriction of diet but automatically restrains the desire for food. This, we think is all that petitioners have ever claimed; this, we think is all that their advertising represents. There is absolute absence of any deceptive representation. It follows that there is lack of substantial evidence to support the finding that a rigorous or restricted diet is necessary.

Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind would accept as adequate to support a conclusion. It must be of such character as to afford a substantial basis of fact from which the fact in issue can be reasonably inferred. It excludes vague, uncertain or irrelevant matter. It implies a quality and character of proof which induces conviction and makes a lasting impression on reason. *Consolidated Edison Company v. National Labor Relations Board*, 305 U. S. 197; *National Labor Relations Board v. Columbia Enameling and Stamping Company*, 306 U. S. 292, 299; *National Labor Relations Board v. Thompson Products, Inc.*, 97 F. 2d 13, 15 (C. C. A. 6). The rule of substantial evidence is one of fundamental importance and marks the dividing line between law and arbitrary power; and the requirement that a finding must be supported by substantial evidence does not go so far as to justify orders without a basis in evidence having rational, probative force. *Consolidated Edison Company v. National Labor Relations Board*, *supra.*, *National Labor Relations Board v. Thompson Products*, *supra.*" [Italics added.]

S. Buchsbaum & Co. v. Federal Trade Commission (C. C. A. 7, 8405, decided January 14, 1946, CCH Court Dec., p. 58044, certiorari applied for)

Facts.—As stated by the court, on petition for review of a Commission order:

"W. C. Reeves was the trial examiner originally appointed to act in this case. He conducted hearings on April 3 and 4, 1941, at Chicago, and on April 11 and 12, 1941, at Toledo, Ohio, at which evidence was taken covering 619 pages of transcript, and 48 Commission exhibits and 17 of petitioner's exhibits were received in evidence. Sixteen witnesses for the Commission testified before him, including all six of the consumer witnesses.

"Mr. Reeves died October 26, 1941. Trial Examiner Vilas was appointed on November 17, 1941, to complete the taking of testimony, close the case, and make his report upon the evidence. Within 4 days from that date petitioner filed with the Commission its motion that there be a trial de novo and that the transcript of hearings before Trial Examiner Reeves be stricken from the record.

The motion was denied by the Commission on December 5, 1941, and Examiner Vilas proceeded from where Mr. Reeves left off and based his report both upon the evidence taken before Mr. Reeves and that heard by him."

Holding of the Court.—The order was set aside, the court saying there should have been trial de novo after the first trial examiner's death:

"The Commission contends that what it calls the marked difference between the functions and authority of trial judges and masters, on the one hand, and trial examiners, on the other, precludes the application of the rule of confrontation in the authorities just referred to. Hence it argues that the finding of examiners being advisory only, there is not present in their findings the principal consideration—that is to say, finality of factual judgment—which requires a trial de novo in the event of the death or disability of a judge or master. We think this does not meet petitioner's contention."

CASES ON "PREPONDERANCE" AND "CLEARLY ERRONEOUS"

United States v. Mancini, 29 Fed. Supp. 44 (D. C. Pa.)

"It should be noted that preponderance of the evidence does not mean preponderance in amount, but in weight" (p. 45).

Guilford Const. Co. et al., v. Biggs, 102 Fed. (2d) 46 (C. C. A. 4)

"The provisions of the new procedural rules that the findings of fact of the trial judge are to be accepted on appeal unless clearly wrong (rule 52 (a), 28 U. S. C. A. following sec. 723c) is but the formulation of a rule long recognized and applied by courts of equity" (p. 47).

State Farm Mut. Automobile Ins. Co. v. Bonacci et al., 111 F. (2d) 412 (C. C. A. 8)

"The rule plainly contemplates a review by the appellate court of the sufficiency of the evidence to sustain the findings. If this were not true, the provision that requests for findings are not necessary 'for the purpose of review' would be meaningless. If the findings are clearly erroneous, the appellate court should set them aside, always giving due regard to the fact that the trial court had the opportunity of observing the witnesses.

* * * * *

"In *Koenig v. Oswald*, supra, we reversed the findings of the lower court in a fraud case because they were deemed to be contrary to the weight of the evidence, even though they were sustained by the spoken word from the witness stand. While the findings of fact are presumptively correct, they are not conclusive on appeal, if against the clear weight of the evidence.

* * * * *

"The facts largely relied upon in this case consist of testimony and written statements given or made by the defendants not in the presence of the lower court but in the course of the trial of the damage actions in the State court. The lower court, as to such evidence, had no better opportunity of judging the credibility of the witnesses than does the appellate court" (p. 415).

United States v. State Street Trust Co., 124 Fed. (2) 948 (C. C. A. 1)

"A finding cannot be set aside unless it is clearly erroneous; that is, against the clear weight of the evidence (rule 52 (a), Fed. Rules Civ. Proc., 28 U. S. C. A. following section 723c" p. 950).

Aetna Life Ins. Co. v. Kepler, 116 Fed. (2) (C. C. A. 8)

"The effect of rule 52 (a) was to establish a uniform standard for testing the validity of findings of fact in any case tried without a jury. The standard adopted was that which had always prevailed in equity.

"This court, with respect to jury-waived cases, is no longer merely a court of error which considers only questions of law. It now acts as a court of review in all nonjury cases in accordance with the practice which formerly prevailed in equity appeals.

"The findings of fact of the court below to the extent that they are unsupported by substantial evidence, or are clearly against the weight of the evidence or were induced by an erroneous view of the law, are not binding upon this court" (p. 5).

A DISCUSSION OF THE DUAL AND CONFLICTING JURISDICTION OF THE FEDERAL TRADE COMMISSION AND THE FOOD AND DRUG ADMINISTRATION CONTAINING EXCERPTS FROM THE COMMITTEE REPORTS AND STATEMENTS OF MEMBERS OF CONGRESS WITH RESPECT TO THE WHEELER-LEA ACT

The dual and conflicting jurisdiction of these two Federal agencies is in the field of regulating commerce in foods, drugs, devices, and cosmetics.

The authority of the Federal Trade Commission is the Federal Trade Commission Act, as amended by the Wheeler-Lea Act, which was approved March 21, 1938 (15 U. S. C. A. 41).

The authority of the Food and Drug Administration is the Federal Food, Drug, and Cosmetic Act, which was approved June 25, 1938 (21 U. S. C. A. 301). It replaced the Federal Food and Drugs Act of June 30, 1906 (21 U. S. C. A. 1).

The two statutes involved, therefore, were enacted by the same Congress. They were considered and reported by the same committee of the House of Representatives, i. e., the Committee on Interstate and Foreign Commerce, and by the same subcommittee of that committee. The reports of this committee and statements made by the committee members on the floor of the House of Representatives clearly show—as do the statutes themselves—that the committee intended to formulate a pattern of regulation which would operate smoothly as a whole without conflict among the parts.

Conflict, however, has developed. It came slowly at first, but later gathered speed and proportion. It is now acute and is constantly becoming more serious.

The conflict has sprung in part from the Commission's effort to make section 15 (a) of the Wheeler-Lea Act support its asserted authority to deal with directions and warnings pertaining to the use of drug and cosmetic products.

That section was to define the term "false advertisement." Rather than be the basis for conflict, the section was intended by the Congress to guard against conflict by excluding labeling from the Commission's jurisdiction.

Whether Congress intended that the Commission should have any jurisdiction over the labeling of foods, drugs, devices, and cosmetics after passage of the Wheeler-Lea Act is a serious question. If Congress intended the Commission to retain any jurisdiction over the labeling of those commodities it was solely on the Commission's general authority over unfair methods of competition.

For the regulation of commerce in foods, drugs, devices, and cosmetics Congress passed two laws: One, the Federal Food, Drug, and Cosmetic Act, to govern the composition and labeling of the products; and the other, the Wheeler-Lea Act, to prohibit the false advertisement of them.

It was not intended to encumber advertising with the minutiae of directions and cautions which appropriately belong in the labeling which is at the hand of the user when the article is used.

This is crystal clear in the congressional debates and reports. Said the committee report in the House of Representatives on the Wheeler-Lea Act (Rept. No. 1613, August 19, 1937, 75th Cong., 1st sess., p. 5) :

"It will be observed that it is not mandatory on the advertiser to state anything. The only requirement is in case he does advertise, he shall not make statements that are misleading in a material respect.

"It is incumbent on the advertiser to reveal facts material in the light of representations made in the advertisement."

When Commissioner Freer appeared before the Senate Committee on Interstate Commerce to testify concerning the Wheeler-Lea bill, he said:

"* * * It should be borne in mind that the Federal Trade Commission deals with false and misleading advertising matter in contradistinction to the prohibitions in the Food and Drug Act, which are directed against the adulteration of foods and drugs and the misbranding and mislabeling of the bottles or packages in which they are contained" (hearing on S. 3744, Senate Committee on Interstate Commerce, 74th Cong., 2d sess., p. 79).

Congressman Reece, a member of the subcommittee which handled the bills, said on the floor of the House (vol. 83, Congressional Record, p. 399) :

"The bill amending the Federal Trade Commission Act and dealing specifically with advertising is before you for action. It is to be followed by a food and drug bill which I, as a member of the committee, believe will give the Food and

Drug Administration of the Department of Agriculture ample authority with which to effectively regulate and control the food, drug, device, and cosmetic industries. If the House passes these two bills, I believe that agreements on such legislation can be effected with the other branch of Congress and we will have equipped two appropriate agencies of the Federal Government with all of the authority and power necessary to properly regulate the food, drug, device, and cosmetic industries, to prevent the dissemination of unlawful advertising, and protect the public."

Congressman Wolverton, a member of the Committee on Interstate and Foreign Commerce, said in the House (vol. 83, Congressional Record, p. 396) :

"It (the definition of a false advertisement) places no requirement on the advertiser to make any statement concerning the commodity, but does require that he shall make no statement that is misleading in a material respect."

And the Commission itself, in its 1942 annual report to Congress, referring to its advertising activity, said (p. 80) :

"* * * The Commission's only object is to prevent false and misleading advertisements. It does not undertake to dictate what an advertiser shall say, but merely indicates what he may not say under the law."

HOW CONFLICT DEVELOPS

In spite of the limitation—clear in the statute and in the expressed intent of Congress—the Commission, in an increasing number of cases, projects its controls into matters of labeling. Perhaps the Commission does not agree that the limitation is clear. In a recent case (*Dearborn Supply Company v. Federal Trade Commission*, C. C. A. 7, 146 Fed. (2d) 5), the Commission's brief referring to section 15 (a) says:

"The contention that the Commission has no jurisdiction over labeling (petitioner's brief, pp. 27-39) is based on the provision of section 15 of the Federal Trade Commission Act, which, *'For the purposes of sections 12, 13, and 14,'* excludes 'labeling' from the statute's definition of a 'false advertisement' of foods, drugs, and cosmetics (52 Stat. 116; 15 U. S. C. A., sec. 55). *This exclusion, we think was intended to apply only in proceedings under sections 13 and 14 of the statute* (15 U. S. C. A., secs. 53, 54), to enjoin or criminally prosecute the dissemination of false advertisements in violation of section 12 (15 U. S. C. A., sec. 52), and was not intended as a limitation upon the Commission's jurisdiction to suppress false labeling by an administrative order to cease and desist." [Italics added.]

The Commission has an ingenious device for controlling labeling. It determines whether an advertisement is "false" by what appears, or does not appear, in the labeling. If the labeling is not satisfactory to the Commission it orders the advertiser to cease and desist disseminating any advertisements which do not contain the warnings which it thinks should be in the labeling, unless the labeling is revised to include them and, in that event, the advertiser is to include in his advertisements the phrase: "Caution: Use Only as Directed." No other phrase will do. And it matters not whether the advertisement be large or small or composed of much, little, or no text.

THE COMMISSION INSISTS ON WARNINGS AGAINST "EXCESSIVE" USE

Many companies which have labeled their products in a manner which has met either the expressed or implied approval of the Food and Drug Administration are finding themselves in difficulty with the Commission because the Commission does not consider the labeling satisfactory. That is true in the cases discussed by the Commission's witness (Mr. Cassidy) (Emerson Drug Co., Docket No. 4854; Capidine Chemical Co., Docket No. 4852; Miles Laboratories, Inc., Docket No. 4993; The Larned Corp., Docket No. 5038).

It is no answer to say, as a Commission witness (Mr. Cassidy) said in referring to some of these complaints that "nowhere in any of the complaints in any of those four cases does the Commission seek to control labeling." Likewise, it would be no answer to say that in those complaints the Commission may have inserted allegations pertaining to other matter. Perhaps the complaints were drawn so as not to disclose the real purpose of the cases. The fact is that the cases were started primarily on the subject of warnings in the labeling. The case files—particularly the stipulations submitted to the respondents before the complaints were instituted (the complaints were not instituted until the respondents refused to sign such stipulations)—show that clearly, and the conduct of such of the cases which are now active shows it beyond doubt. The cases have

been instituted by the Commission in an effort to compel the manufacturers to revise their labeling to include announcements that the "Excessive" use of the products may have dire effects such as mental derangement, collapse, serious blood disturbances, etc. No definition of the word "Excessive" is provided.

THE LAW DOES NOT APPLY, AND WAS NOT INTENDED TO APPLY, TO CASES WHERE POSSIBLE INJURIOUS CONSEQUENCES MIGHT FOLLOW USE OTHER THAN THAT RECOMMENDED

The conference report on the Wheeler-Lea Act, as it refers to the definition of "false advertisement," said:

"The section does not contemplate penalization in those cases where the use is not as recommended and is not under usual or customary conditions. It is not intended to extend to cases where there might be injurious results merely because of reactions of consumers due to their peculiar idiosyncrasies or allergic conditions." (H. Rept. No. 1774, 75th Cong., 3d sess., p. 10.)

When the Wheeler-Lea bill was being discussed in the House of Representatives, January 12, 1938, the following colloquy occurred (vol. 83, Cong. Rec., p. 414):

"Mr. O'MALLEY. May I ask the gentleman from California [Mr. LEA] if it would be his understanding, as well as the understanding of the members of the committee, that the term 'false advertisement' in this section would mean that the advertiser failed to say, for instance, that Sloan's liniment is unhealthy to drink? Would this be a false advertisement if some one used it to drink?"

"Mr. LEA. No. * * * He is not required to say anything in his ad, but if he does state anything it must be true."

And at the same time the following occurred (vol. 83, Cong. Rec., p. 412):

"Mr. WHITE of Ohio. Let us take, for example, the manufacturer of cosmetics. If cosmetics are used for normal purposes and injury occurs, the gentleman would want to punish the man who put out the cosmetics, but, on the other hand, if these cosmetics are eaten by somebody or used for a purpose other than prescribed, certainly the gentleman would not want to hold the manufacturer responsible?"

"Mr. LEA. No. We are shortly going to come along with a food-and-drug bill which is pretty well prepared for presentation to the House. The gentleman referred to cosmetics. The new food-and-drug bill will require a warning of what may be the deleterious effects if used under certain conditions. We are going to take care of that in the label and misbranding features."

One of the Commission's witnesses (Mr. Cassidy) referred several times to the case of *Miles Laboratories v. Federal Trade Commission* (C. A. D. C. 140 Fed. (2d) 683). That was a case instituted by Miles Laboratories when confronted by the Commission with the demand for a stipulation in the case above referred to as Docket No. 4993. The company had the choice of signing the stipulation, which required a change in the warnings on its labels, or of being subjected to a complaint and proceeding by the Commission. The company instituted suit for a declaratory judgment and, while the court did make the statement which the Commission witness considered favorable to his position and which he therefore quoted, the court also made this highly significant statement (685):

"In the present case and on the present record—if the question were open—it might very well be argued that appellant's advertising is neither false nor misleading, when considered in the light of the statutory provision requiring no more than a revelation of all material consequences which may result from the use of the product in the customary way or under the conditions prescribed in the advertisement. But since the matter is not open we have no occasion to examine or weigh questions of fact or law, since they are in the first instance within the exclusive jurisdiction of the Commission and its decision when made is subject to challenge only as provided in the act; nor is there anything in the Declaratory Judgment Act which changes this result or creates new rights or increases or extends the jurisdiction of the courts *Doehler Metal Furniture Co. v. Warren*, 76 U. S. App. D. C. 60, 129 F. 2d 43, 45)."

HOW DUAL CONTROL WORKS

Several years ago the Food and Drug Administration caused a large quantity of Bromo-Seltzer to be seized, alleging misbranding primarily with respect to the adequacy of the directions and warnings. After much consideration, the formula and labeling of Bromo-Seltzer were revised and the litigation was terminated. Then the Federal Trade Commission moved in. Now the company

is engaged in the trial of a Commission complaint, Docket No. 4854, in which the Commission demands warnings in excess of those which appear in the revised labeling. The case has been going on for a protracted period of time with hearings at many places in the United States from coast to coast and from the Gulf to the Great Lakes. See the attached chart as to it and two other cases discussed by the Commission witness. And compare the complaints in these cases with the stipulations which were submitted by the Commission to the companies prior to the filing of the complaints.

These cases are perfect examples of dual and conflicting jurisdiction. As the Circuit Court of Appeals for the Seventh Circuit said in the Willard Tablet case (*U. S. v. Willard Tablet Co.*, 141 Fed. (2d) 141), holding a Commission order to be res judicata against the Food and Drug Administration:

"We, therefore, have the incongruous situation of one branch of the Government approving the method now pursued by the claimant and another branch seeking to condemn."

Thus, an agency which is "complainant, jury, judge, and counsel" and an agency which the courts feel powerless to restrain either as to the findings of fact or the application of the remedy, would determine the rights of the manufacturers as to the claims for their products whether in advertising or labeling.

IN THE MATTER OF EMERSON DRUG COMPANY—DOCKET NO. 4854

Product.—Bromo-Seltzer:

Places where FTC has taken testimony:	Number witnesses each place
Tuscaloosa, Ala.....	2
Columbia, S. C.....	1
Chicago, Ill.....	1
Lansing, Mich.....	1
New York, N. Y.....	1
San Francisco, Calif.....	2
Los Angeles, Calif.....	None
Washington, D. C.....	1
Philadelphia, Pa.....	2
Washington, D. C.....	4
Baltimore, Md.....	2
Washington, D. C.....	1

IN THE MATTER OF MILES LABORATORIES, INC.—DOCKET NO. 4993

Products.—Dr. Miles' Nervine, Dr. Miles' Nervine Tablets, Dr. Miles' Anti-Pain Pills:

Places where FTC has taken testimony:	Number witnesses each place
Tuscaloosa, Ala.....	2
St. Augustine, Fla.....	1
Warren, Pa.....	1
Washington, D. C.....	1
Baltimore, Md.....	1
Dallas, Tex.....	1
Los Angeles, Calif.....	2
San Francisco, Calif.....	1

IN THE MATTER OF CAPUDINE CHEMICAL COMPANY—DOCKET NO. 4852

Product.—Hick's Liquid Capudine.

Places where FTC has taken testimony:	Number witnesses each place
Tuscaloosa, Ala.....	2
St. Augustine, Fla.....	1
Warren, Pa.....	1
Washington, D. C.....	1
Baltimore, Md.....	1
Dallas, Tex.....	1
Los Angeles, Calif.....	2
San Francisco, Calif.....	None

(Position taken by James F. Hoge on behalf of the Proprietary Association, August 10, 1935, on the Federal food, drug, and cosmetic bill, S. 5, sometimes referred to as the Copeland-Chapman bill, which consolidated regulation of both labeling and advertising in the Food and Drug Administration:)

STATEMENT (IN PART)

OF

JAMES F. HOGE

ON BEHALF OF THE PROPRIETARY ASSOCIATION

BEFORE A SUBCOMMITTEE OF THE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, HOUSE OF REPRESENTATIVES, ON H. R. 6906, H. R. 8805, H. R. 8941, AND S. 5, TO REGULATE FOODS, DRUGS, AND COSMETICS, AUGUST 10, 1935—PAGES 694-696

PAGES 694-669

MR. CHAPMAN. Mr. Hoge, state the usual facts for the record, as to your name, place of residence, business address, profession, and the person or persons for whom you speak.

MR. HOGE. My name is James F. Hoge, of the law firm of Rogers, Ramsay & Hoge, 41 East Forty-second Street, New York City, and I appear on behalf of the Proprietary Association.

MR. CHAPMAN. Will you, Mr. Hoge, file with the clerk a list of your companies?

MR. HOGE. I will be glad to, and I will mention some of the names here.

The membership of this association, Mr. Chairman, consists of several hundred members. I am not sure of the exact number. It will appear on the list. But I think there are slightly more than 200, perhaps, manufacturers of proprietary medicinal and toilet preparations. The annual production of these members represents about 80 percent in volume of the proprietary drugs and medicines that are sold in this country annually.

Nearly all of these people are advertisers, and some of them are among the largest advertisers in the country. The nature of the business and an index to the membership are disclosed by some of the outstanding products, such as Absorbine, Alka Seltzer, Bayer Aspirin, Bromo-Seltzer, Fletcher's Castoria, Ingram's Shaving Cream, Ipana Tooth Paste, Lavoris, Listerine, Mentholatum, Musterole, Pepsodent, Phillips Milk of Magnesia, Sal Hepatica, Scott's Emulsion, Vitalis Hair Tonic, Zonite, and so on.

These manufacturers are as vitally affected, Mr. Chairman, by this legislation as any others, and perhaps more so than many others. Because of that this association and its members have been interested and active in the whole course of this legislation since the introduction of the original bill, S. 1944, on June 12, 1933. That was the Tugwell bill. We opposed that bill, believing that it was a fantastic piece of legislation adapted to such vast interests as foods, drugs, cosmetics, publishers, and other businesses.

MR. CHAPMAN. Just at that point, for my own part, I am frank to say that I also was very much opposed to it, and this committee, in fact, never did conduct any hearings on it.

MR. HOGE. I know that is true. Our opposition, of course, was in the Senate, and we also opposed S. 2000, which was a revision of it, introduced in January 1934, and S. 2800, introduced in February 1934, another revision.

S. 5 was introduced this year, in January, and represented at that time a rearrangement of many sections of the previous bill with some new matter added. We opposed certain sections of S. 5, which were brought over from the previous bill.

When it was amended to the form in which it passed the Senate on May 28, this association withdrew its opposition. We did that not because S. 5 had become a thoroughly satisfactory bill to this association or to its members. We did it because the bill had been so altered as to remove the substance of our principal objections, and we did not feel that, as an organization, as an association, we could longer stand between this bill and its passage.

We do not oppose the bill here today and we do not propose any amendments.

I am particularly glad to say that, Mr. Chairman, because up until this time we have considered it necessary to be an opponent, although all the while we have realized that improved food and drug legislation was, and is, needed, not only in the interest of the public but in the interest of legitimate industry.

And there is need for this legislation, Mr. Chairman. I know from private practice that drug and chemical connections and compounds are made up in attics and cellars, and in the back yards, and peddled among the financially unfortunate and the illiterate. We do need legislation that will clean up this situation. And, because of peculiar circumstances, I think the chief threat to the security and the prosperity of industry such as I am speaking for is unscrupulous competition. When that is added to prejudicial attitudes at times and emotional appeals, it is peculiarly important to the security of an industry such as I am talking for that it be regulated. Legitimate business needs an umpire, and crooked business needs a policeman.

Heretofore our views on specific legislation took the form of endorsement of the Mead bill. We now approve also the Copeland bill, which, because of the greater care and study given it in its course through the Senate, is at this time a more comprehensive bill.

FEDERAL TRADE COMMISSION,
Washington, March 15, 1946.

Re Hearings on H. R. 2390 (Reece bill), testimony of James W. Cassidy.

HON. GEORGE G. SADOWSKI,

*Chairman, Subcommittee of the Committee on Interstate and
Foreign Commerce of the House of Representatives,
House Office Building, Washington, D. C.*

DEAR SIR: On Thursday, March 7, 1946, during the hearings before the subcommittee of the Committee on Interstate and Foreign Commerce of the House of Representatives on H. R. 2390, and particularly on pages 502 to 506 of the stenographic transcript and during the course of my testimony, Congressman Reece made certain statements and asked certain questions regarding the Dearborn case (*Federal Trade Commission v. Dearborn Supply Company*) which are incorrect and which, I am sure, both you and Mr. Reece would desire to correct when the matter is called to your attention.

Beginning on page 502 Mr. Reece states:

"Mr. Chairman, if I may, before he renews his statement, I would like to call the witness' attention to a statement which I understood him to make with reference to the date on which the Dearborn case was begun."

Following this statement Mr. Reece continued to discuss the Dearborn case with me, and on page 504 of the transcript stated:

"I assumed that there was investigation in advance of the serving of the complaint but the investigation was concluded and the complaint drawn up after the act was passed and in light of the increased powers which it gave the Commission. In that same connection, you were careful in your statement that there was no reference to labeling in the complaint."

Thereafter, on pages 504 and 505, the transcript discloses the following:

"Mr. CASSEY. There is none.

"Mr. REECE. That is correct.

"Mr. CASSEY. It is a pure advertising case.

"Mr. REECE. That is correct. But when the stipulations were issued, which the company was asked to sign, of which I have what purports to be a copy, it goes on at great length and sets out the labeling and warnings which are required to be used; that is in this stipulation, to be signed by the petitioners. It quotes the labeling and the caution which the Food and Drug Administration had suggested be placed upon the bottle of the product referred to.

"Then, the stipulation states that the cautions suggested by Food and Drug are not sufficient and sets out a new labeling and new cautions which must be met if the company signs the stipulation and thereby closes the case.

"That is just the point that I was undertaking to make the other day, which evidently you misunderstood, Mr. Cassidy, when that provision was being used to indirectly control the labelings.

"In the copy of the stipulation, after quoting the labeling and the warning which the Food and Drug Administration suggested be placed upon this product, this sentence appears in the stipulation: 'The caution appearing on the containers in which such products are packaged fails to include a warning to the effect that repeated and excessive use of said drugs may result in mental derangement.'

"As I stated awhile ago, the stipulation goes ahead and sets out the type of labeling and the type of caution which must appear.

"Then the stipulation contains a provision that if the labeling which meets the views of the FTC, and the caution, are included, then the advertisement can read: 'Caution; use only as directed.'

"And what impressed me after reading this stipulation was that your statement that the complaint did not have reference to labeling, did not reveal the full story which one expects from a representative of a governmental agency when he appears before the committee. Because I do not see how anyone can read that stipulation without coming to the conclusion that the FTC is exercising jurisdiction over labeling and the type of caution that shall be used in connection with the labels. That appears to be the whole purpose of it and it certainly has that effect."

Anyone reading the foregoing statements of Congressman Reece would certainly get the impression that a stipulation was offered to the respondent in the Dearborn case that dealt with labeling, warnings, and cautions, when as a matter of fact the proposed stipulation in the Dearborn case contains no reference whatsoever to labeling, warnings, and cautions. The proposed stipulation in the Dearborn case was prepared and offered to the respondent during 1937 and prior to the enactment on March 21, 1938, of the Wheeler-Lea amendments to the Federal Trade Commission Act. I enclose a copy of that stipulation and request that it be filed, together with this letter, as a part of my testimony.

If you will compare this stipulation with the statements made by Congressman Reece, such comparison will conclusively demonstrate that Congressman Reece could not have been referring to the proposed stipulation in the Dearborn case. For instance, on page 505 of the transcript Congressman Reece quotes a sentence which he says appears in the stipulation, as follows:

"The caution appearing on the containers in which such products are packaged fails to include a warning to the effect that repeated and excessive use of said drugs may result in mental derangement."

This sentence does not appear in the proposed stipulation in the Dearborn case, and it should be especially noted that the Dearborn case dealt with cosmetics and not with drugs. It is obvious to me that Congressman Reece was referring to some case other than the Dearborn case.

The statements made by Congressman Reece indicate to me that he may have been referring to the proposed stipulation in the Miles Laboratories, Inc., case. The proposed stipulation in that case does include the statement quoted by Congressman Reece, and this fact will be demonstrated by an examination of that proposed stipulation which has already been filed with the committee as a part of my testimony.

If Congressman Reece was in fact referring to the proposed stipulation in the Miles Laboratories, Inc., case, then I respectfully refer the committee to that part of my testimony wherein I discuss this subject in connection with the policy of the Commission under section 15 (a) of the Federal Trade Commission Act, as amended by the Wheeler-Lea amendments of 1938. As you will remember, I reached the conclusion that the Commission, in following this policy, was not attempting to regulate labels, and supported this conclusion by the decision of the Circuit Court of Appeals of the District of Columbia in the case of *Miles Laboratories, Inc. v. Federal Trade Commission*, (140 F. (2d) 638 (1944)), in which the court stated:

"The Commission denies, and we think correctly, that it is attempting to regulate appellant's labels. All that is said on that subject was to offer that means of correction as a choice which appellant could take or leave as it pleased."

This decision was prior to the issuance of the complaint in the Miles Laboratories, Inc., case and dealt with the proposed stipulation which I believe Congressman Reece had in mind when making the statements now appearing on pages 504 and 505 of the transcript of the hearings before your subcommittee.

In view of the misleading and incorrect statements of Congressman Reece which I have pointed out in this letter, and in view of the fact that I undertook to answer fully every question that was asked me, and in addition thereto discussed in great detail the subject of the so-called conflict of jurisdiction between the Federal Trade Commission and the Food and Drug Administration, I feel that Congressman Reece was unjust to me and unfair to the Federal Trade Commission when he said that my statement:

"* * * did not reveal the full story which one expects from a representative of a governmental agency when he appears before the committee. Because I do not see how any one can read that stipulation without coming to the conclusion that the FTC is exercising jurisdiction over labeling and the type of caution that shall be used in connection with the labels. * * *"

JAMES W. CASSEDY,
Special Attorney.

cc: Hon. B. Carroll Reece.

UNITED STATES OF AMERICA BEFORE FEDERAL TRADE COMMISSION

File No. 1-10861

IN THE MATTER OF DEARBORN SUPPLY COMPANY, (A CORPORATION), CHICAGO, ILL.

STIPULATION AS TO THE FACTS AND AGREEMENT TO CEASE AND RESIST

Pursuant to the provisions of an Act of Congress, approved September 26, 1914 (38 Stat. 717; 15 U. S. C. A., Sec. 41), the Federal Trade Commission caused an investigation to be made of the methods of competition in commerce used by Dearborn Supply Company, a corporation, and from representations made concerning the methods used in the sale of its products in interstate commerce, the Federal Trade Commission is of the opinion there is reason to believe that the aforesaid corporation has been using unfair methods of competition in commerce in violation of the provisions of Section 5 of said Act.

It now appearing that Dearborn Supply Company is desirous of avoiding the issuance of a complaint and the taking of testimony, by stipulating the facts and agreeing to cease and desist from using the methods of competition hereinafter set forth, and the Federal Trade Commission is willing to accept such stipulation and agreement without prejudice to its right to issue a complaint and institute formal proceedings against the said Dearborn Supply Company at any time the breach of this agreement or the use of unfair methods, not covered by this agreement, appear to the Commission to be justified by the facts:

IT IS HEREBY STIPULATED AND AGREED by and between the Federal Trade Commission, hereinafter referred to as the Commission, and Dearborn Supply Company, hereinafter referred to as the respondent, that in order to dispose of this matter without the issuance of a complaint, the following is a true statement of the facts;

Dearborn Supply Company is a corporation organized and existing under the laws of the State of Illinois, with its principal place of business located in the City of Chicago, in the State of Illinois. It is now and has been for more than one year last past engaged in selling in interstate commerce, preparations designated MERCOLIZED WAX, PARKER BELMONT BEAUTY CREAM, POWDERED SAXOLITE, POWDERED TARKROOT, and PHELACTINE, and causing the same when sold to be shipped from its place of business in the State of Illinois to purchasers thereof located in other States of the United States of America.

In the course and conduct of its business the said respondent was at all times herein referred to, in competition with other persons, firms, and corporations likewise engaged in the sale, in interstate commerce, of similar articles and of articles used for the same and similar purposes.

In the course and conduct of its business, as hereinbefore described, the respondent made, published, or caused to be published the following statements, claims, and representations to induce the purchase of its products:

Mercolized wax

"You'll find only Mercolized Wax has been so formulated that it actually absorbs the discolored outer scales in tiny flake-like particles clearing away the grimy, dirt-laden surface skin."

"Free your skin blemishes and all discolorations that mar its natural loveliness with our Mercolized Wax."

"Mercolized Wax brings to you a simple, natural way of beautifying the skin and keeping it young. The effectiveness of Mercolized Wax lies in the fact that it contains active ingredients that actually absorb the surface skin with all its discolorations and blemishes. This absorption process is not discernible. Gradually you will notice the new clearness and smoothness of your skin. Soon the entire discolored outer layer of skin will have disappeared and the fresh underskin which forms your new complexion appears soft, white, and youthfully beautiful. Mercolized Wax brings out the hidden beauty in your skin."

"Any blemishes that exist on the outer skin are naturally absorbed with it."

"While you sleep this delightful cream brings new loveliness and radiance up from beneath the discolored surface skin."

"There is only one way to completely beautify a discolored blemished complexion and that one way is to take off the worn out surface skin by absorbing it with pure Mercolized Wax."

"Coarseness, roughness, and other blemishes that rob the skin of youthful beauty are dissolved with the surface skin."

"One reason Mercolized Wax is so strongly recommended is that it really takes the place of several different cosmetics, saving time, patience, and expense."

"Any woman not satisfied with her complexion can easily remove it and have a new one . . . Mercolized Wax is a simple remedy which will always do the work."

"Mercolized Wax will convert a faded, worn-out, or discolored complexion into one of captivating loveliness."

"A treatment for a bad complexion that is always successful is the nightly application of pure Mercolized Wax."

"Any complexion can be made smoother, clearer, younger with Mercolized Wax."

"It takes away all imperfections."

"It cleanses, softens, bleaches, lubricates, and protects."

"It clears away freckles, tan, oiliness, sunburn, or any other blemishes."

"Invisible particles of aged skin are freed and all defects such as blackheads, tan, freckles, and large pores disappear."

Parker Belmont Beauty Cream

"Wonderful oxygen cream bleaches skin."

"Parker Belmont Beauty Cream beautifies any skin."

"A skillful scientific blending of creams for bleaching, pore-deep cleansing, clearing, softening, lubricating and all-around beautifying."

"Parker Belmont Beauty Cream whitens skin quickly."

"Dark skin is lightened and whitened two or three shades."

"This single cream is a blend of all the creams your skin requires."

"Parker Belmont Beauty Cream normalizes a dry or too oily skin. It is soothing to sensitive tissues."

Powdered saxolite

"Saxolite Astringent is a refreshing skin tonic. Smoothes out wrinkles and age lines. Refines coarse pores. Eliminates oiliness."

Powdered tarkroot

"A Tarkroot Beauty Mask revives and refreshes a fatigued, drooping face more quickly and completely than anything else can."

"It is beneficial for almost every condition such as age lines, wrinkles, enlarged pores, blackheads and other surface blemishes."

"Wrinkles and age lines are smoothed out. Relaxed, sagging contours are pulled up into proper position. The circulation is aroused to nourish the drooping tissues. Pores are purged of all impurities."

"Tarkroot Beauty Mask wakes up dull skin!"

"Tarkroot Face Rester relieves facial fatigue."

"The quickest way to renew your complexion is to give yourself a facial pack treatment with Tarkroot Beauty Mask."

"Beautify your skin with Tarkroot Face Mask."

"Tarkroot performs a four-purpose plan of beautifying by tightening, refining, purifying and stimulating."

Phelactine

"Try Phelactine Depilatory, removes superfluous hair gently. Leaves skin smooth, soft and hair-free. Simple to use."

"Try Phelactine—the 'different' hair remover."

The respondent hereby admits:

That while, according to reliable medical authority, Mercolized Wax in concentrated form will act as an irritant and will tend to reduce, by contrast, the visibility of small skin discolorations, the ultimate result of the use of this preparation is a deeper and more persistent pigmentation than that which was previously visible;

That, according to reliable medical authority, Mercolized Wax does not "absorb" half-dead sluggish outer skin blemishes; and its continued excessive use may result in mercury poisoning;

That, according to reliable medical authority, Parker Belmont Beauty Cream cannot be considered an oxygen cream and, while it may have a slight bleaching effect, it is not a blend that supplies all the skin requires or an all-in-one beautifier and it will not normalize a dry or too oily skin;

That, according to reliable medical authority, Powdered Saxolite is not a skin tonic, will not remove wrinkles or age lines, correct flabby or sagging skin, refine coarse pores, or have any appreciable effect as a rub for tired, overworked muscles;

That, according to reliable medical authority, Powdered Tarkroot will not revive and refresh a fatigued, drooping face, or smooth out wrinkles and age lines, or pull relaxed and sagging contours into proper position, or arouse circulation or purge pores of all impurities, or wake up dull skin, or renew complexion, or beautify skin by tightening, refining, purifying, and stimulating;

That, according to reliable medical authority, Phelactine does not remove superfluous hair gently, or leave the skin smooth, soft and hair-free, and it is not different from many similar preparations on the market.

The respondent hereby stipulates and agrees in soliciting the sale of its products in interstate commerce to cease and desist from representing directly or otherwise—

(a) That the use of Mercolized Wax will free the skin of blemishes and all discolorations that are not superficial and due to external causes;

(b) That Mercolized Wax—

1. Keeps the skin young; or
2. Brings new loveliness and radiance up from beneath the discolored surface skin;

(c) That the use of Mercolized Wax is the "only" way to completely beautify a discolored blemished complexion;

(d) That Mercolized Wax—

1. Dissolves coarseness and other blemishes;
2. Is a simple remedy which will always easily remove the old complexion and produce a new one;
3. Will convert a faded, wornout, or discolored complexion into one of captivating loveliness;
4. Is always a successful treatment for a bad complexion;
5. Will make any complexion smoother, clearer or younger;
6. Takes away all imperfections; or protects;
7. Clears away oiliness, sunburn, or any other blemishes that are not superficial and due to external causes;
8. Causes all defects, such as blackheads and large pores, to disappear;

(e) That Parker Belmont Beauty Cream:

1. Is an oxygen cream;
2. Lightens and whitens dark skin 2 or 3 shades; or
3. Normalizes a dry or too oily skin;

(f) That Parker Belmont Beauty Cream is a blend of all the creams the skin requires;

(g) That Parker Belmont Beauty Cream is a scientific blending of creams for pore-deep cleansing;

(h) That Powdered Saxolite:

1. Smooths out wrinkles and age lines; or
2. Refines coarse pores; or
3. Eliminates oiliness;

(i) That Powdered Tarkroot is beneficial for almost every condition, such as age lines, wrinkles, enlarged pores, blackheads, and other surface blemishes;

(j) That a Tarkroot Beauty Mask revives a fatigued, drooping face more quickly and completely than anything else can;

(k) That Powdered Tarkroot or a Tarkroot Beauty Mask:

1. Smooths out wrinkles and age lines;
2. Pulls relaxed, sagging contours into proper position;
3. Arouses circulation to nourish drooping tissues; or
4. Purges pores of all impurities;

(l) That Tarkroot Beauty Mask:

1. Wakes up dull skin;
2. Relieves facial fatigue;
3. Beautifies the skin;
4. Renews the complexion; or
5. Performs a four-purpose plan of beautifying, by tightening, refining, purifying, and stimulating;

(m) That Phelactine:

1. Removes superfluous hair "gently"; or
2. Is the "different" hair remover;

and from making any other claims or assertions of like import.

The respondent further stipulates and agrees not to publish or cause to be published any testimonial containing any representation contrary to the foregoing agreement.

IT IS ALSO STIPULATED AND AGREED that if the said respondent should ever resume or indulge in any of the practices in question, this stipulation of the facts may be used in evidence against it in any proceeding that the Commission may institute against the said respondent.

WITNESS the following signatures this _____ day of _____, 1937.

FEDERAL TRADE COMMISSION,
By _____, *Chairman*.

DEARBORN SUPPLY COMPANY,
By _____

APPROVED :

FEDERAL TRADE COMMISSION,
By OTIS B. JOHNSON, *Secretary*.

CPG/h

(Whereupon, at 5:20 p. m., Monday, March 11, 1946, the committee adjourned.)

×

